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BIOGRAPHY AND ESSAYS IN
HONOUR OF

HON. JUSTICE IORHEMEN
HWADE OFR

CHIEF JUDGE, BENUE STATE



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VALLEY OF DECISIONS

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Dedication

This Book is in honour of Hon. Justice Iorhemen Hwande CFR, The Chief Judge of Benue State whose contributions to the development of the Judiciary call for remarkable recognition such as this.

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INTRODUCTION

Arnold Bennet the British Novelist had a publisher who boasted about the extraordinary efficiency of his Secretary. One day while visiting the publisher's office, Bennet asked her "your boss claims you are extremely efficient what's the secret? Its not my secret said the Secretary: its his" Each time I do something for him, he never fails to acknowledge and appreciate it. Because of this I take infinite pain with everything I do for him.

Its human need to feel important. If we want to bring out the best in others let us acknowledge them for all the right things they do. A behaviour or benevolence one acknowledged, can evoke a sense of importance, such sensation can compel others to go the extra mile.

Hon. Justice Iorhemen Hwande took up appointment on the lower bench in 1979 and rose steadily to the enviable position of Chief Registrar in 1986 in which capacities he irreversibly and positively touched the lives of those who came into contact with him.

On the blessed morning of 1989 as rustling leaves on the trees and birds in the air as well as fish flapping their fins through waves in the waters beneath all sang or acted praise to the Almighty God for the new day, his Lordship tested and trusted took a place on the hallowed bench of the Benue State Judiciary.

By dint of hardwork, his Lordship was appointed as Chief Judge of Benue State on the 6/4/2006. Since then, the sector under his able leadership has witnessed unprecedented growth by way of appointments, establishment of superior courts of record that hitherto, were an illusion.

This work is a conscious attempt to celebrate his Lordships exploits just as the ovation is still on. By celebrating his Lordship it is intended to ginger his Lordship up.

His Lordship's decision to stay taken while alone in the gigantic house at Oguma while on posting as Magistrate, is today the result of

numerous decisions in the causes and matters that came before him. With walls on either side, a courtroom is typical of or wears the semblance of a valley in a way. This is where decisions are churned out. In the walls of the courtroom it has been harvest of decisions. That explains the choice of the topic *Valley of Decisions*.

This book is divided into two parts with 19 chapters running into 367 pages. The first five, contain a resume on the person and personality of the amiable Chief Judge of Benue State, Honourable Justice Iorhemen Hwande, his pedigree, his judicial philosophy and ideology.

The second part contains diverse academic reflections, Chapter six, Dr. Akaa Imbwaseh examines the Legal and Economic Imperatives in the incorporation of an insurance company in Nigeria. He writes with great authority in this aspect of the law. The chapter is well planned, carefully written and well articulated.

Chapter seven entitled "Towards a Better Administration of Criminal Justice in the 21st Century in Nigeria" is anchored by Aondofa Aligba Esq. It is lucid and will be of great assistance to researchers in the field.

Chapter eight anchored by N. I. Iorun takes on Issues and Perspectives in Insider Dealings by Company Directors and the Nigerian Capital Market. Issues relating to shaddy deals by directors are carefully stated and thoroughly analysed. That exposition is to say the least illuminating.

Chapter nine captioned "United Nations Convention on the Law of the Sea as a Tool for the Resolution of Climate Change Disputes" written by Dr (Mrs.) M.M. Dura examines the convention on the law of the sea in every minute detail. Her arguments and conclusions through the felicity of language employed are easy to follow.

Chapter ten authored by Dr. Moses Ediru, takes on a topical issue: The Legal Effects of Confessional Statement and plea of Guilty on Burden of Proof in Drug trials with the case of Omoju v. FRN as a bench mark. In so far as trials in drug related matters are concerned, the article is juicy and worthwhile.

Chapter eleven authored by L.O. Ogiji Esq. deals with consent provisions in the Land Use Act and the travail of the mortgage industry in Nigeria. The topic is of importance as it has been a thorn in the flesh in land transactions. It is clear from the analysis that the venomous sting in the consent provision is being gradually removed.

Chapter twelve, written by Dr. P.A. Ocheme addresses the issue as to whether a practicing Christian lawyer or a judge in Nigeria is anachronism. The author moves away from the common trend of writing on a legal subject to a soul searching or examination of conscience even in the course of ones professional calling. In the 'Sermon' the writer gives a profound view of what is expected of Christian lawyers and judges. It is well researched and thoroughly articulated.

Chapter thirteen is contributed by V.A. Shima, Esq. He examines the concept of insurable interest and the principle of indemnity in Insurance contracts. These principles are carefully stated and thoroughly examined. Those who desire to take advantage of the Insurance industry have a lot to learn from this article.

Chapter fourteen anchored by J.M. Shishi Esq. examines the imperative of democratic governance in Nigeria, highlighting some constitutional and statutory inhibition that tends to inhibit the free flow of democracy. It is detailed and enlightening.

Chapter fifteen written by Kaase Tony Fyanka takes us headlong, to justiciability issues in respect to social rights, appraising the emergent comparative international and regional case law on the point. The author makes a case for some constitutional reforms that will make justiciable social rights in line with universal human rights aspirations and values.

In Chapter sixteen, A. I. Ityonyiman examines the polemics of summary trial procedure under Section 157(1) of the Criminal Procedure Code. From practical experience the writer leaves no one in doubt that the summary trial procedure is a path to tread with caution.

Chapter seventeen anchored by Dr. E.A. Kenen discusses the liability of employer for wrongful termination/dismissal of his employment under the Nigerian law. The chapter is admirably written, sound, vivid and scholarly in analysis and was written with great care and authority.

Chapter eighteen written by Dr. U.D. Ikoni examines the International Economic Law and Development. It takes on the various instruments adopted by government to regulate and restrict international trade, the rationale for such intervention and the implications for foreign investment in developing countries. The chapter is both informative and contemporary.

Chapter nineteen authored by Dr. A.A. Ijohor SAN, examines the appointment of judicial officers to the superior courts of Benue State. It urges that the culture of appointing the right caliber of persons or minds to the superior courts be sustained. It is a compendium of information on the subject.

The Editorial Board invites each reader to write an independent 20th chapter in true love and spirit of the honoree.

Chapter One



Family Background

Introduction

'Looking at a king's mouth,' said an old man 'one would think he never sucked at his mother's breast.' It is possible to imagine that a person like Justice Iorhemen Hwande, might not have passed through ups and downs of life.

From his background, it is obvious that palm kernels were never cracked for him. He cracked them himself. Like other men, life is a struggle. He rose from a very humble background to the exalted office of the Chief Judge of Benue State. An encounter with his lordship as to his pedigree, philosophy and judicial ideology as the details unfold, is not only revealing but freshivating. Welcome to the world of a Farmer, a Teacher, a Magistrate, a Chief Magistrate, a Judge and a Chief judge.

Father

The gift of a baby boy is seen as a great achievement. The basic assumption is that the boy would perpetuate the family name. Hwande Agakpa of Mbaikyon Tsambe in Vandeikya

Local Government Area of Benue State had a duty to welcome to his household and to the world a baby boy on the 15th December 1952. He could not have felt different upon the blessings being showered by the birth of his son whom he christened IORHEMEN, a gift to perpetuate his name.

Like all other children, save otherwise, little Hwande grew up under the watchful eyes of his father, Hwande Agakpa. Hwande Agakpa known for his strength and hard work is said to have experienced hard times in life. He was on several occasions conscripted into forced labour. He was part of the labour force that worked on the railway line from Otukpo to Makurdi. He also served as a labourer at the Makurdi Bridge and at the Tin mining Jos, otherwise referred to as 'kwaza.' Gentle and soft spoken, he was at peace with all and sundry and resolved disputes that defied solution by elders. He was a philanthropist. The young Hwande was to learn through him that managing a home was not an easy task and grew up to experience same.

Mother

Like the father, Kpenjiren the daughter of Andura from Mbangur, Mbara in Vandeikya Local Government Area might equally have been grateful to God for the gift of a son.

She did more to influence the character of the young Iorhemen as she was closer to him. He learnt under the feet of his mother who embraced Christianity through her mother's instrumentality. The little Iorhemen taught his mother who had not had formal education, how to read the Bible. His mother showed enthusiasm over his performance in the class. In spite of her influence, and interest over the performance of her son, she could not predict his son's future. She was never to know about

his future as she died in February 1966, while little Iorhemen was in primary seven.

Siblings

Iorhemen was not the only child of his parents. Mrs. Masenengen Aba (nee Hwande) is his sister. The death of their mother threw her into a challenge of managing the home as a mother. It is acknowledged that she was equal to the task in this regard and found no difficulty each time her attention was called.

When the young Iorhemen found the apple of his eyes, Masenengen took over to fill the vacuum created by the demise of their mother. From courtship to marriage, she was very effective. She is closely knit to the family of the wife so much so that she is regarded as part of that family. Masenengen is married to Tyokyase Aba of Mbajor Vandeikya Local Government Area.

Chapter **Two**



Marriage

Wife

The 'missing rib' Iember Orkeghen Guma was in Adikpo "London", having changed school from Naraguta in Jos, Plateau State. She moved to N.K.S.T. Secondary School, Adikpo. As fate would have it, the young Iorhemen Hwande had just been unable to secure admission to study Law, not willing to go into any other discipline; he opted to take up a teaching appointment at N.K.S.T. Secondary School Adikpo. By providence the duo as teacher and student met and that signalled courtship. The young Iorhemen was eventually offered admission to study law at the Ahmadu Bello University, Zaria. By divine arrangement, the distance was not a barrier, and the courtship was not put asunder, the result was the wedding of 28th October, 1978 while Iorhemen was in Port- Harcourt for the National Youth Service Corps Scheme.

Children

The marriage between Iember and Iorhemen is a blissful one. It is blessed with five children to wit: three girls and two boys. Mrs. Awashima Ukpi (nee Hwande) is the first child, a lawyer, now a State Counsel at the Ministry of Justice, Makurdi. Next is Nguemo Hwande, a graduate of Mass Communication Benue State University. Mr. Terhemba Hwande is the third child, a graduate of the University of Jos and now a Lecturer at the College of Advanced and Professional Studies, Makurdi. He is married. Miss Wueseter Hwande the 4th is an Accountant and a staff of Benue Property and Investment Company. She is on the verge of becoming a chartered accountant. The fifth child came at the heels of a request by the only boy to have a brother to play with. This request was presented before God and granted- Vershima was born. Like Samuel and Samson, prayers were offered for these children while they were still in the womb. The children have all grown up with the fear of the Lord.

Chapter Three



Early Education

Primary School

His enrolment in school was not automatic. The young Iorhemen started in a Bible School at Takuruku. His father did not contemplate sending him to school. He was in the habit of following his cousin to school as he had interest in western education. Parents were contented that their children were able to read some local papers like Icharegh, and Christian literature (Akaa A Bibilo). The determination persisted. It eventually paid off when God decided to use one Iornumbe Kurgbe to send a message across to all parents in the area. He was the Headmaster of the Sudan United Mission (SUM) Primary School Adeiyongo.

By October 1960, SUM primary school had vacancy for forty children to enrol into primary one. As part of the drive, Kurgbe went round with the news that government had directed that all children of school age be sent to school. That parents who defaulted would be imprisoned. This threat to parents indeed prompted a favourable response. It worked and the young

Iorhemen was enrolled in the primary school. While at school, Iorhemen came into contact with teachers who were accommodating and he endeared himself to them. Asegh Ikyura was one of the teachers who taught him in primary one. Timothy Nyimkaan Terkpe was his lordship's teacher in primary four and was fond of him. His white shirt on top of a white nicker and a neck tie blended with his shoes perfectly. He would hold the hands of the young Iorhemen and move around with him in the market square, a relationship, his lordship also cherished.

The young Iorhemen was privileged to participate in the celebration of Nigeria's independence in 1960. His lordship recalled that the celebration of independence was quite exciting. Each pupil was given a Nigerian flag, a plastic cup and powdered milk. These flags were displayed at a parade held in the school at Adeiyongo where the pupils had assembled. While the older pupils were selected to go to Gboko. The most senior class at Adeiyongo was primary four. His lordship therefore had to take an entrance examination into the Senior Primary school at Mbaakon. He was successful and got admitted there in 1964. At Mbaakon, his lordship met one Anger Abanyi -the headmaster of the school who found favour with him. Igba Ayati was his lordship's teacher in primary seven. His lordship still keeps in touch with some of his teachers and/or their families.

Thoroughly drenched in these influences, his lordship was spurred to win laurels. He won prizes in Bible knowledge and Geography.

Secondary Education

In the Common Entrance Examination of 1966, Government College Keffi featured as his lordship's first choice. However, as fate would have it, his result was delayed and his name did not appear on the list of admitted students. He was later offered admission at Teachers College Mkar. His lordship had preference for secondary school education but his headmaster, Mr. Anger Abanyi persuaded him to attend the Teachers College as it was easier to pick up appointment upon completion. His lordship was convinced and moved in. Fate still had its way as his uncle who was to make up his fees was not forthcoming and his lordship was forced out of school.

The legend Bob Marley is quoted in one of his tracks "Coming in from the cold" as saying 'when one door is closed, another is opened.' Government Secondary School Otobi now Otukpo, established along with Government Secondary School (GSS) Lafia and Government Secondary School (GSS) Gboko, were to take off. As new schools, there was delay. The disappointment over fees became a blessing when his lordship was offered admission into Government Secondary School (GSS) Otobi to pursue his secondary education as against training in a teachers college. His lordship along with Senator George Akume started school together in 1967 at Otobi. The school was relocated to its present site at Otukpo in 1970 under the headship of Isaac Aku. In spite of the poor facilities at the school his lordship made an impressive outing in the result in both arts and science subjects projecting himself as an all rounder.

His lordship recalls one notable incident while at the school at Otobi in 1967. There was this soldier who came from battle to the school and started firing. The news went round that the

Biafran army had surrounded the school which was seven miles away from Otukpo:

One soldier came with ammunition to our school and started firing. The students ran to Otukpo -some seven miles away from Otobi. It was later discovered that the soldier got drunk and was misbehaving and not that it was the Biafran army. As they ran for safety in groups, one of the students, Atagher Longoga ran alone for fear that the groups might be killed. He got lost and it took two weeks to spot him in a farm at Igede where he was taken back to the school. There was yet another encounter with the soldiers in 1970. Students were playing football when soldiers entered the pitch. The students complained but the soldiers would not walk by the edges of the pitch. They were forced out of the pitch and they tried to fight back. The students descended on the soldiers and beat them. In the course of the fight one of the soldiers lost his teeth. The soldiers went to the barracks at Otukpo to mobilize. It became a conflict between the students and the Army and it took the intervention of the Principal who invited the Military Police who ordered the soldiers back to their barracks.

Chapter **Four**



Higer Education

Higher School Certificate

Having proved his mettle at Government Secondary School (GSS) Otukpo, the young Iorhemen had no difficulty when it came to placement at the Higher School Certificate class.

Though in a different school, Isaac Aku who was the Principal at Otukpo, had moved to Government Secondary School, Kuru as the Vice Principal. He was on the panel for the selection for admission into the Higher School Certificate (HSC) class. He therefore had no difficulty selecting Iorhemen who had been his student at Otukpo and he knew his abilities. His lordship recalls Gordon Esa, Esq. who was his classmate at the HSC class. He offered the following subjects: Geography, History and Literature.

University Education

Following his success at the Higher School Certificate examination, the young Iorhemen was set for direct admission to study law. University of Nsukka had no such offer. Ahmadu Bello University Zaria, the most popular and only university up North had. It readily opened its door in that Ivory tower to his lordship. As at that time, Professor Khalil was the Dean of Law.

His classmates at the 'largest University' were numerous. But he recalled in particular Gordon Esa, Esq., Adakole Ikwue, Esq.; late G. S. Agernor, Esq.; R.N. Chenge, Esq. now in the Gambia; Hon. Justice Dogara Mallam a Judge of Kaduna State High Court and Professor Onje Gyewado. While at the University, His lordship was not only a "bookworm", he took off time to play volleyball and squash.

Call to Bar

His lordship attended the Nigerian Law School like any other lawyer. As part of professional training, His lordship was called to the Bar in 1978. In those good old days, graduates were employed and given car loans. He was employed as a Court Clerk to the Chief Judge after graduation. He was thus a car owner even before he attended the Law School. The car was involved in an accident at Ikpayongo.

Chapter Five



Career Years

National Youth Service Scheme (NYSC)

The National Youth Service Scheme was introduced in 1973 and designed to avail Nigerians compulsory service for a period of one year to their fatherland. His Lordship was posted to Port-Harcourt along with his friend and classmate late G. S. Agernor, Esq. The duo could afford hotel accommodation at that time. His Lordship recalls that the Scheme was exciting. It was in the course of service that he met A. A. Utuama now a Professor of Law and Deputy Governor of Delta State. By and large, it was never a dull moment throughout the service year.

Magistracy

Upon completion of service, his Lordship had a desire to go into private practice. He prepared a ground to this effect as he had useful discussion with the Late D.G. Vembeh with a view to joining his law firm. D. G. Vembeh was actively involved in politics and was in the Nigerian Peoples Party. Aper Aku and

J. S. Tarka with whom his Lordship also related well, were of the National Party of Nigeria. His Lordship imagined a situation where a case of political nature would pitch him against Tarka and Aku on one hand and the interest of D. G. Vembeh's law firm on the other. He refrained from joining the law firm for this reason. With that decision the young Iorhemen picked up appointment in the Judiciary as a Magistrate. He still had his eyes outside as, according to him, he intended to put in five years to make out the period of pupillage and then withdraw his services. It was indeed a decision to behold as God had his plans behind it.

His first place of posting was Oguma in Bassa Local Government Area of Benue State. He arrived Oguma thinking he was still on the way. An unnoticeable town for its smallness, the young Iorhemen still enquired as to the road to Oguma. The answer that he was already in Oguma did not impress the young graduate. Oguma, a small place had just been made the headquarters of Bassa Local Government upon the creation of the local government.

Iorhemen was ushered into an eleven bedroom building for his accommodation. He invited other staff to share the accommodation. He imagined what to do with such a big accommodation. He thought to himself, and sat down to write a letter of resignation, but a voice came to him 'Do you think God was asleep during your posting?' Upon a second thought influenced by this voice, he tore the resignation letter and decided to stay. He served for one year and was posted to Oju.

Oju was yet another area with its peculiarities like Oguma. His Lordship weathered the storm until he was posted to Adikpo. Adikpo made much difference as it had more lawyers

who appeared before his Lordship. It afforded the opportunity for his Lordship to prove his mettle and it indeed prepared him for a leadership position. He was posted to Idah where he served briefly and was thereafter appointed Ag. Chief Registrar in February 1986. To his Lordship, the magistracy is a period of learning.

Appointment to the Higher Bench

His Lordship recalled that the then Hon. Chief Judge, Alhassan Idoko, upon a certain morning congratulated him. He retorted for what? The then Chief Judge replied 'you have been appointed a High Court Judge.' This was how the news of his elevation was relayed to him. Before then he was not consulted. His Lordship who still had his eyes outside wanted to decline the appointment. His desire was to venture into some engagements like lecturing or private practice before taking up appointment on the higher bench as it would be monotonous having to keep adjudicating throughout ones life. Like in other situations, he contemplated resisting but ended up that if God had willed it, why would he decline. Against the backdrop of the conditions of service at that time one would readily agree with his Lordship that it was not out of place to contemplate a refusal of the offer.

Appointment as Chief Judge

Following the retirement of Hon. Justice T.U.F. Puusu as Chief Judge, a vacuum was created. His successor, Justice Ejembi Eko in acting capacity had exhausted his acting appointment. Hon. Justice Iorhemen Hwande was then appointed in acting capacity as Chief Judge in 2006. This appointment was confirmed and he was made the substantive Chief Judge on the 16th April, 2006. He says the office is quite challenging. A

Chief Judge by his Lordship's accounts carries the weight of the entire judiciary on his shoulder as a beast of burden, so to say. He fosters the relationship with the State Executive Council and the Federal Judiciary. The welfare of his brother Judges is another area of attention. In all these areas, the Hon. Chief Judge is a man to beat.

Abraham's blessings are his. The elevation of indigenes of the State to the Federal and State High Courts at his time is unprecedented in the history of the State Judiciary. The presence of Federal Judiciary at his time is what he attributes to God's blessings. He feels he would have been better placed in private practice to help humanity as a lawyer, all the same he believes doing justice to litigants is what he records as his achievements and the nurturing of promising young men in the judiciary.

His Judicial Ideology

There is no art to find a man's construction on the face, goes a popular saying. Yet as students of literature, it is possible to hazard a guess as to one's disposition by two or three ways viz: what he says about himself, what others say about him, and what he does.

Taking our bearing from the above, we can locate the ideological inclination of a judge using his pronouncements as the conceptual compass for his ideological tension. This we can do, when we appreciate the literature of judicial behaviouralism. In analysing judicial behaviour, there are two principal ideologies. These are judicial restraint and judicial activism.¹

¹ Kayode Eso, *Thought on law and jurisprudence* (Lagos MIJ professional Publishers Ltd. 1990) p. 31.

The ideology of judicial restraint is said to have its origin in a caveat found in Sir Francis Bacon's essay entitled *of judicature*² He wrote:

Judges ought to remember that their office is ius dicere and not ius dare, to interpret and not to make or give law.

The English Common Law adopted this Baconian theory. Thus it became the pivot of literal approach to judicial interpretation in common law jurisprudence.³

The ideology of judicial restraint posits that the judge should concern himself with the application of the law as it is. In effect, law as it is written.⁴ The role of the judge is seen as merely declaratory, his judgments purely a declaration of the law.⁵ This is the declaratory or phonographic theory of judicial function.⁶ The regime of social justice is, therefore, an anathema to the concept of judicial restraint.

This-rule-book approach, it is submitted, is likely to be an ill wind that blows the socio economic problems no good as it cannot meet the dynamic needs of the law. This meta-judicial function characterised by its near idolatrous attachment is said to belong to the political process. The judge is under an obligation to apply the law, notwithstanding its disparity with legal teleology.⁷

2 See Francis Bacon, *Essays* (London Wordsworth Editions Limited 1977) 150.

3 Ilegbune, C. U.: "Statutory Interpretation: The Impregnable Reign of Literalism: in 1978-1988 3 Nig JR 145.

4 Merrill, J.G. – *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press 1998) 229.

5 Niki Tobi – "Law, Justice and the Constitution – whether in Nigeria in All Nigeria Judges Conference papers 1995.

6 Phagwat, PN, The role of the judiciary in the democratic process, balancing actions and judicial restraint JHRHP Vol. 2 No. 3 [1992] 7,8.

7 See Nwaze C. C. Eugenies: *The sociology of A Judicial Ideology Justice in the Judicial Process. Essays in Honour of E. C. Ubaezonu*, JCA.

On the converse, the ideology of judicial activism is antithetical to that of restraint. This theory has no room for the mechanical approach. Thus the court cannot afford to be helpless where existing rules are unsatisfactory; but still he does his activist engineering without usurping the legislative functions of the lawmakers.

The net effect of the ideology of activism is a conception of law which transcends mere rules. It acknowledges the fact that the judge cannot ignore the law as enacted, however it is an essential attribute of the judicial function to develop and if necessary to change it. The *raison d'être* of this rule, is to reconcile the rules to the wider objectives of justice.

Proceeding from that innovative background, where do we locate the judicial ideology of our honoree? A foray into one of his judgments, will provide a steady guide: In *Kuya Zungwe v. Hyacinth Zashava & Anors.*⁸, the counterclaimant had made a claim against his husband seeking an order of possession of a plot of land. The husband who enlisted in the Army had undergone several postings to Kaduna, Makurdi, Enugu, Awka and Kano Military formations. Both husband and wife agreed that it was not convenient for her to follow him to every of these places. Counterclaimant was to stay in Makurdi with the husband visiting. She acquired a plot of land at Makurdi in 1970, using the name of her husband to avoid suspicion, more so that the marriage was not blessed with the fruit of the womb. She developed this plot and went into occupation. Her husband eventually joined her on retirement when he decided to relocate to his village in Vandeikya, and attempted to dispose of this property to the 2nd defendant. The counterclaimant resisted, deposing that it

8 Unreported suit No. MHC/23/2011.

was not her intention to transfer her title in the property to her husband (1st defendant to counterclaim.) The 1st defendant to counterclaim (husband) cashing in on the certificate of occupancy that was in his name made a case that oral evidence was inadmissible to show that title rested with the counterclaimant by virtue of section 132 of the Evidence Act.

Rejecting that contention, his Lordship said:

In the present case, the counter claimant did not just pay the fees for the land, situate at No. 51 Otukpo Road, she went further and constructed a house on that plot using her resources. It is my view that a case of resulting trust is clearly made out from the evidence before the court. It is also established that the counterclaimant had all the title and is also in possession of the plot in issue. I hold that she remains the beneficial owner of the plot in dispute.

As it will be seen from the above innovative reasoning of his lordship, section 132 of the Evidence Act strictly speaking would have defeated the counterclaim by strict adherence. His Lordship relied on the cases of *Ughutevbe v. Solomon* [2004] All FWLR (pt 220) 185 @ 2,3 and *Madu Umadu* [2002] (part 128) FWLR, 227 and thereby chose, to examine parol evidence in order to give effect to the transaction in the certificate of occupancy.

With a track record of over 30 years of service on the bench, his Lordship has an abiding place in the history of the Judiciary of this nation. His courageous judicial pronouncements are part of his legacies to this country. The contributions of his lordship to the sacred course of justice are so vast and expanse

that constraint of space may not allow us to do justice in recalling same.

Be that as it may, the trial by his Lordship of three police officers, a Divisional Police Officer inclusive, for the gruesome murder of two students was acclaimed by the public in the way and manner the matter was handled and invariably discouraged extra judicial killings. Suffice it to say that whatever facet of his judicial ideology, his Lordship has proved to be the master of the situation.

Chapter **Six**



Incorporating an Insurance Company in Nigeria: Legal and Economic Imperatives

Dr. Akaa Imbwaseh*

Introduction

The English law of contract and a fortiori, the Nigerian law of contract, has its roots going back to the Middle Ages. Most of the general principles were developed and elaborated in the eighteenth and nineteenth centuries. These principles and perhaps even more, the general approach of the courts to contractual questions, may be referred to as the traditional or “classical theory” of the Law of Contract. Though, the Law of Contract has undergone some fundamental changes in the twentieth century, it is quite impossible to understand the modern law of contract without some knowledge and appreciation of the background and origins of the classical theory of the law.

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The classical theory of the law of contract was developed in the heyday of *laissez-faire*. This theory posited that men had an inalienable right to make their own contracts for themselves and that the law should interfere with contractual situation as little as possible.¹ To the judges of that era, the function of the court in relation to a contractual obligation was largely an unwarranted one. The main object of a contract, in view of the classical theory was to enable people to realise their wills or in more prosaic language, to leave them to go on with their business, to lead their own lives unhampered by governmental interference.

As applied to the Law of Contract, these ideas meant encouraging almost unlimited freedom of contracting, and thus the shibboleths 'freedom of contract' and "sanctity of contract" became the foundations on which the whole law of contract was built. Insurance being one sort of a contract, this analysis is apposite.

The regulation of insurance services involves the requirement of minimum capital from insurers, statutory reserves, control on premium rates and settlement of claims.

The Philosophical Basis of the Modern Law of Incorporation

The Insurance Act 2004,² provides that "no person shall commence or carry on any class of insurance business in Nigeria except... a company duly incorporated as a limited liability company under the Companies and Allied Matters Act, 2004". It means, therefore, either a private company or a public company can validly carry on the business of insurance in Nigeria. It is against this backdrop that this analysis of the philosophy

1 Atiyah P.S. *An Introduction of the Law of Contract* (Oxford University Press London, 1981) p. 4.

2 Section 3 (1) (a) Insurance Act, 2004.

underlying the law of incorporation is relevant to insurance companies.

The constitution³ of a modern company consists of two documents usually bound up as one – the Memorandum and Articles of Association. These are all that is prescribed by law.⁴ There is considerable freedom of choice in the drafting of the original documents but this freedom is more restricted when it comes to constitutional change. In the case of the memorandum, there are considerable restrictions on change but even in the case of the articles, freedom is curtailed to protect minorities from oppression.

The purpose of the constitution is to provide for the distribution of profit, risk and control within the company. Profits are to be distributed in accordance with shareholders' rights which may be specified in the memorandum but nowadays these are more usually set out in the articles. The memorandum sets out the basis of liability of members – limited or unlimited and limited by shares or guarantee. Allocation of control between the company in general meeting and the board of directors is dealt with in the articles. However, profit and control and allocation of risk amongst the proprietors *per se* are often the subject-matter of shareholders' agreements where these are used. Shareholders' agreements are mainly used in the case of private companies and joint ventures between larger companies.

In broad terms, the memorandum governs the relationship between the company and the outside world. The company identifies the name by which it is first incorporated and the purposes and objects for which it is formed. Originally, incor-

3 Farrar J.H; *Farrar's Company Law* (2nd edition Butterworths, London. 1988) p.79.

4 Section 35 (2) (a) Companies and Allied Matters Act, 2004.

poration was regarded as a privilege and there was a natural tendency on the part of the courts to restrict it. This led to the development of the ultra vires doctrine which protected some creditors at the expense of others. Shareholders and intra vires creditors were protected from unauthorised depletion of the capital fund. The history of the ultra vires doctrine is a history of the struggle between two competing models of incorporation that is, the legal privilege model and the freedom of contract model.⁵

Whereas the legal privilege model emphasizes responsibility through restriction and the fulfilment of conditions, the freedom of contract which is premised on the laissez-faire philosophy, emphasizes utility of the rights to incorporate and the freedom of choice of incorporation under a liberal economy state concerned with facilitating rather than restricting business.

The legal privilege model is the oldest model of incorporation and dates back to the middle ages. Indeed, early business corporations were often regarded as the arms of the state or means of extending state control. This model continued as the dominant model even after the liberal reforms of 1844 – 1856 in Britain. The origins of the freedom model perhaps lies in the 1844 Act, although some commentators stressed that this represented state intervention as well. It grew in strength as a result of the Limited Liability Act, 1855⁶ and the adoption of the modern form of the Memorandum and Articles of Association in 1856.

The reforms of the 1890s which provided for alteration of objects and the growing liberalism of judicial decisions on

⁵ Farrar J.H. Op cit. Page 79.

⁶ Yagba T. A. T. et al Elements of Commercial Law; (Tamza Publishing Co, Ltd. Zaria 1994) P.292.

ultra vires from the turn of the century added to this trend. It perhaps reached its logical extreme in 1972 when in *Ebrahim v. Westbourne Galleries LTD*,⁷ the House of Lords allowed the contract model greater significance than the legal privilege model.

The supremacy of the contract model manifests in the choice of name of the company; the object clause; the location of the registered office; the nominal capital; the nature of the contract between the members and the company and the company and officers and members; and voluntary winding up.

The legal privilege model, however, places restrictions on the types of names that the initial corporators can choose; prohibits certain objects that are against public policy, prescribes authorized nominal minimum share capital, and lays down criteria for recognizing the contracts contained in the Memorandum and the Articles of Association.

The two models of incorporation are utilized side by side under the Companies and Allied Matters Act, 2004. Take for instance, the freedom of contract under section 41 of the Companies and Allied Matters Act which is to the effect that on registration, the memorandum and articles have the effect of a contract under seal between the company and its members and officers themselves is qualified in practical application.

In *Eley v. Positive Government Life Assurance Company*,⁸ a member who was employed as solicitor under the articles was held not entitled to enforce the contract of employment by virtue of the provisions of the Articles of Association.

7 (1973) AC 360.

8 (1876) 1 Ex. D. 88.

On the other hand, no matter what the articles of association say, a promoter is not entitled to remuneration even if the articles of association provide expressly. In *Melhado v. Porto Allegere*⁹ the articles of association of a joint stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider right and such expenses should be deemed and treated as preliminary expenses to the amount not exceeding £2000. The plaintiff who was the promoter of the company incurred preliminary expenses. It was held that no action for those expenses would lie at the suit of the plaintiff against the company because according to Lord Coleridge, no legal principle could be found on this and further that there was no contract between the plaintiffs and the defendants.

This case was decided long before the Companies and Allied Matters Act, 2004 was promulgated. The Act expanded the categories of persons under section 41 who would be beneficiaries under any contract created by the combined force of the Memorandum and Articles of Association. The provision is, however, silent on promoters. It, therefore, means that the decision is valid in interpreting section 41 of the Companies and Allied Matters Act 2004.

On the other hand, the courts have given legal effect to incorporation of pre-emption clauses in the articles of association as constituting a contract binding the members and directors. *Rayfield v. Hands*,¹⁰ the articles of a private company provided that if a member intended to transfer his shares, he should inform the directors. The directors were mandated to take the said shares equally among them at a

9 (1874) LR 9 CP 503.

10 (1960) ch. 1.

fair value. It was held that the articles bound the defendant directors to buy the plaintiff's shares.

Similarly, while the incorporators are free to choose any name of their choice such names should comply with the provisions of section 30 of the Companies and Allied Matters Act, 2004, that is to say, such names should not be identical with an existing name or contain the words Chamber of Commerce unless it is a company limited by guarantee, or violate an existing trade mark. Except with the permission of the Corporate Affairs Commission, no company shall be registered with the following additions, Federal, National, Regional, State, Government, Municipal, Chartered, Co-operative, Building Society or Group or Holding.

At common law, tortious liability in an action for passing off will arise against any company which adopts or uses the name of an existing company thereby representing his business to be that of the complaining company. This would be remedied by damages and/or injunction. In *Niger Chemists Ltd. v. Nigeria Chemists*,¹¹ the plaintiff company had carried on business as chemists and druggists for some years and had several branches. The company was well known under the name of Niger Chemists. The defendant formed a firm carrying on exactly the same business under the name Nigeria Chemists, similar to the name, Niger chemists which was likely to cause confusion. It was held that the plaintiff was entitled to an injunction restraining the defendants from using that name or any other name closely resembling Niger Chemists.

¹¹ (1961) ALL NLR 171.

The legal privilege model envisages a democratic board of directors and general meeting operating by majority rules. It does not mandate compliance with natural justice, though occasionally the courts will imply it¹². It envisages that the company's dirty linen be laundered within the company but on the whole is pretty silent on the matter of resolving disputes. Its approach to the board of directors is collegiate and egalitarian with the exception of the managing directors authority and the chairman's casting vote. The corporate democracy so constituted, however, grants no franchise to employees or creditors.

The equitable concept of the good of the company which was inherited from partnership as the yardstick at general meetings, has traditionally meant in practice the good of the proprietors, though the law is fast recognizing other interest groups in a company for example, the consumers, the host communities. At the moment, English law and Nigerian law have not developed a concept of fiduciary obligation on majority shareholders as exists in the United States of America.¹³

In legal theory, the corporate constitution represents a complicated area where public law such as constitutional law interacts with the laws of agency, contract and equity. In the development of company law, ideas have been borrowed from each of these branches of law. However, at the end of the day it must be recognised that the corporate constitution is *sui generis*. Mistakes can arise if any analogy is pushed to extremes.

The memorandum and articles of association serve a multiplicity of business organisations of differing sizes and with

12 Farrar F.A., op cit P. 80.

13 Farrar F. H., op cit P. 80.

differing pressures. The statutory model although regarded by some economists as a standard form contract which rational contractors adopt, has proved rather limited in practice and has been supplemented by both judicial equity and self-help by incorporators and their legal advisers.

The greatest restriction on freedom of contract is the inability of a director as fiduciary to abuse his position. The fiduciary concept is perhaps the most potent modern weapon in the judicial armoury in spite of its intellectual limitations. This emphasizes the public interest in the corporate constitution and the regulation of corporate executive conduct.

Laski J, in the Canadian Supreme Court Case of *Canadian AERO Services Ltd. v. Omalley*¹⁴ described this as:

An updating of the equitable principle whose roots lie in the general standards that I have mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day (sic) accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour...

14 (1974) 40 DLR (3d) 371, 384.

The Requirements for Incorporating an Insurance Company in Nigeria

Section 18 of the Companies and Allied Matters Act, 2004 provides that any two or more persons can incorporate a company by subscribing to the Memorandum of Association and/or otherwise comply with the requirements for registration. It therefore follows that any two or more persons can incorporate a company that can carry on insurance business.

The pertinent issue here is whether this requirement of “two or more persons” makes any practical sense. Gower argues that even though this requirement appears less convenient, it is apparently pointless since there is no way of ensuring that both parties concerned would be active members.¹⁵ In practice, one of the members may either be a nominee of the other or even a mere dummy devoid of any financial interest. In any case, it has long been recognised that there is nothing wrong in forming a one-man company in which one person is the beneficial owner of all the shares. In *Salomon v. Salomon & Co.*,¹⁶ Mr. Salomon had for many years carried on business as a leather merchant. In 1892 he decided to convert it into a limited liability company and for this purpose, Salomon & Co., was formed with Salomon, his wife and five of his children as members while Salomon was the Managing Director.

The company purchased the business as a going concern for £39,000. Seven shares were sub-scribed in cash by the members and the result was that Salomon held 20,001 of the 20,007 shares issued and each of the remaining six shares was held by a member of his family apparently as a nominee for him. The company almost immediately went into difficulties and a

¹⁵ Gower L.C.B., *Principles of Modern Company Law*. (6th edition. Stevens & sons London) P.80.

¹⁶ (1897) AC 22.

year later, the company went into liquidation. Its assets were sufficient to discharge the debentures but nothing was left for the unsecured creditors. Salomon was a secured creditor.

The House of Lords held that the company is in law a different person altogether from the subscribers, though, it may be that after incorporation, the business is precisely the same as it was before and the same persons are managers and the same hands receive profits, the company is not in law the agent of the subscribers or trustee for them.

It is therefore clear that practically, the requirement of two persons only makes it necessary that the second person's name should be joined probably to preserve the fiction that a company is an association of persons. It is submitted that this fiction serves no legal or economic purpose and it makes for clarity to statutorily permit one or more persons to form a company instead of two or more persons.

In Ghana¹⁷, one or more persons may form a company. This provision is clearly more intelligible and consistent with existing judicial authorities.¹⁸

On the other hand, the unification of the requirement for both private and public companies^{18a} appears to ignore the difference in the economic functions between the two types of companies. It seems absurd that a public company can be formed by two persons only, for in such a case the company is not public in outlook except in name.

17 Section 8, Ghana's Company Code, 1963.

18 *Lee v. Lee's Air Farming Ltd* (1961) Ac 12; *Bornu Holdings Ltd v. Dipcharina* (1976) S.C. 63.

The historical and economic roles of companies have been to enable a large number of contributors to bring together large amounts of capital for investment. A public company formed by two persons cannot play such a role. It would be better for a company which has been floated by a small number of persons with a view to going public at a later date to start off as a public company in the popular sense, that is, with wide participation otherwise the possibilities for abuse and exploitation in a subsequent floatation scheme would be much more enhanced when the process is controlled by the original members.

Classification of Insurance Companies

One of the key requirements for the formation of a company under the 2004 Act is whether the company sought to be registered is private or public.¹⁹ The main differences between private and public companies are stated in section 22 of the Act, namely, that the maximum number of members of a private company is fifty. On the other hand, there is no limit on the membership of public companies. The question to be answered is whether this limit of fifty members serves any useful purpose. Professor Ayua,²⁰ for example, argues that the limit of fifty members is suitable in the Nigerian context because it takes care of the extended family system.

However, Justice Price,²¹ argues that the number of fifty far exceeds the needs of any family business and that it in fact conflicts with the assumption that the private company answers the desire for incorporation by a small number of persons sharing trust and confidence in each other.

18a Section 18, Companies and Allied Matters Act, 2004.

19 Section 8 Companies and Allied Matters Act, 2004.

20 Ayua I.A., *Nigerian Company Law* Badfordshike, Graham Burn. (1984).

21 Price J., *Private Enterprise in East Africa* Buttermorah. Kenya (1984) P.25.

On close examination of realities of our time, it is submitted that the so called maximum number of fifty is also nothing but a legal fiction for the following reasons:-

Limited liability companies may also be members of a company. In practice, a large number of companies are in fact subsidiaries of other companies. In effect this means that there is no limit on the number of persons who may directly or indirectly be shareholders.

On the contrary, no limit is placed on the number of debenture holders. This makes nonsense of the restriction since in practical terms, there is no distinction between shareholders and debenture holders since debenture holders seem to have almost the same rights in many respects like shareholders. For example, if the debenture deed so permits, they may attend meetings, elect or remove directors, liquidate the company or put it into receivership²².

Secondly, a private company is required to restrict the transfer of its shares and that it must not invite the public to subscribe to any shares or debentures of the company or to deposit money for fixed periods or payable on call whether or not bearing interest²³. Cumulatively, these restrictions prohibit private companies from soliciting investment from the public. In economic theory, this is said to be the most significant difference between private and public companies.

However, the interpretation put on the equivalent of these provisions under the repealed Companies Act, 1968,²⁴ seems to make the distinction less important than it appears. In *Government*

22 Section 39(4), 303 and 310 Companies and Allied Matters Act, 2004.

23 Section 22 (2) – (5) Companies and Allied Matters Act, 2004.

24 Section 8, Companies Act, 1968.

Stocks and other Securities Ltd. v. Christopher,²⁵ it was held that the prohibition on the public subscribing for shares or debentures in private companies extended only to acquisition by the company for cash. This means that issues for non-cash consideration are not prohibited.

It is also significant that section 137 of the 2004 Act dealing with valuation of non-cash considerations for shares applies only to public companies. Thus, the embargo on private companies regarding public solicitation does not prevent a private company from making an attractive offer to a large number of persons interested in acquiring shares or debentures on the basis of non-cash consideration with an inbuilt disguised discount.

Finally on this point, the 2004 Act dichotomises between private and public companies by exempting the former from filing or publishing certain information relating to their financial records.²⁶ On the one hand, it is argued that all companies claiming limited liability should be required to disclose as fully as possible all information relating to their constitution, functioning and viability because disclosure is the price to pay for enjoying the privilege of limited liability.²⁷ Put differently, disclosure is the only justification for limited liability.

On the other hand, it is argued that uniform disclosure would be prejudicial to private companies in relation to its more powerful rivals from a competitive point of view. It is also argued that given the limited nature of interest in such companies, the cost of uniform disclosure would outweigh the benefits.²⁸

25 (1956) 1 WLR 237.

26 Section 334 of the 2004 Act.

27 Yagba T. A. T. et al op cit P. 276.

28 Section 35(2)(a) Companies and Allied Matters Act, 2004.

It is submitted that the middle road solution worked out under the 2004 Act is a sensible compromise though based on wrong indices. Most viable private limited companies in Nigeria are subsidiaries of transnational corporations. Since transnational corporations create problems of regulation through vertical and horizontal integrations, it would be more sensible instituting the same legal regime of disclosure, at least for now, for all types or sizes of companies except a company limited by guarantee. To treat the matter mildly would compound the transnational question.

An insurance company seeking registration must submit printed copies of its Memorandum and Articles of Association to the Corporate Affairs Commission.²⁹ In functional terms, the Memorandum and Articles of Association serve to provide the contractual framework between the shareholders and the managers, shareholders and the company, the managers and the company³⁰.

The two documents taken together serve two main purposes, that is, to balance the power and duties of directors, shareholders, managers and investors and to provide for the distribution of profit and risk within the enterprise. In effect, the Memorandum of Association is said to define the insurance company's external relations. The Articles of Association usually settles the internal allocation of rights and liabilities and the rules for running the enterprise. The pertinent question at this juncture is why are these documents filed as separate documents?

29 Section 41, Companies and Allied Matters Act, 2004.

30 Yagba T. A. T. *et al* op cit P. 228.

Before 1856, the company's constitutional documents were contained in one set of regulation called the "deed of settlement". It was only the 1856 Act of England that introduced the distinction between the Memorandum and Articles. When that distinction was introduced in 1856, the idea was to keep the alterable and unalterable parts of the constitution distinctly apart³¹. The original intention was that the memorandum of Association should be unalterable in order to protect the investors while the articles of association was to be the alterable bye-laws for internal regulation. However, since 1890, it has become possible to alter any of these documents one-way or the other³². Therefore, the permanency which was envisaged for the Memorandum of Association no longer exists.

It is submitted that this distinction does not serve any legal or economic purpose and should be jettisoned from the Nigerian law in the interest of simplicity and brevity. In Ghana,³³ a single document may be printed and filed and it is referred to as "regulations". It is further submitted that when the two documents are treated as one in law, it would streamline, harmonise and simplify the interpretation of the constitutional documents in place of the present approach which treats one part of the constitution as subordinate to the other. For example, in the case of *Guinness v. Land Corporation of Ireland*,³⁴ it was held that the Articles of Association could not be resorted to in order to fill any gap in the Memorandum of Association in respect of any matter which by law is required to be in the Memorandum of Association.

31 Yagba T. A. T. et al op cit P. 228.

32 Sections 44, 47, 48, Companies and Allied Matters Act, 2004.

33 Section 11, Ghana's Company Code, 1963.

34 (1882) 22 CH. D 376.

The Corporate Affairs Commission Requirements

The Corporate Affairs Commission is the only body charged with the responsibility for registration of companies including insurance companies in Nigeria³⁵. The Act therefore provides that the subscribers to the Memorandum of Association should furnish evidence of compliance with any other law relating to incorporation.³⁶ Furthermore, the 2004 Act³⁷ empowers the Corporate Affairs Commission (hereinafter called the Commission) to refuse registration of a company if it has failed to comply with any other law relating to incorporation.

The first implication of those two provisions appears to be that the decisions in *Kehinde v. Registrar of Companies*,³⁸ and *Lasisi v. Registrar of Companies*,³⁹ have been statutorily overruled. Those cases held that the Registrar of Companies under the Companies Act, 1968 was obliged to register a company once the subscribers *ex facie* had complied with the Companies Act. Therefore noncompliance with the Nigerian Enterprises Promotion Act⁴⁰ in both cases was said to be no business of the Registrar of Companies. It has been submitted that these two decisions in effect reduced the registrar to a mere clerk and incorporation itself became more of a revenue measure than a regulatory instrument.

If the Commission, however, refuses to register the Memorandum and Articles of Association of a proposed insurance company, any person aggrieved by such refusal may give notice to the Commission requiring it to apply to the court for directions

35 Section 7(1) Companies and Allied Matters Act, 2004.

36 Section 35(2)(e) Companies and Allied Matters Act, 2004.

37 Section 36(1)(d) Companies and Allied Matters Act, 2004.

38 (1979) 3 L.R.N. 213.

39 (1976) 7 SC 73.

40 Decree NO. 3, 1977.

and the Commission shall within 21 days of the receipt of such notice apply to the court for directions. This provision with all due respect is strange. It would appear that mandamus cannot lie against the Commission except to the extent of compelling it to elect whether to go to court for directions or not. This provision encumbers a citizen's right of access to court as guaranteed by the 1999 Constitution of Nigeria⁴¹.

The Regime of Names

The 2004 Act permits promoters to choose any name of their choice for a proposed company provided such a name is not objectionable under the provisions of section 30 of the Act. This approach creates a unified regime of business names. It also streamlines the commercial use of names. This is a healthy approach because put in objective context, this would prevent unsophisticated people from being misled by business names.

However, there are certain problems associated with the regime of names as a whole for instance, section 29(5) of the 2004 Act stipulates that the names of companies must end with certain abbreviations for example "Ltd" for a private company limited by shares, "Plc" for a public company limited by shares. The key point here is that these abbreviations are more apt to give misleading signals than to convey the true nature of the company in question as the law assumes. In the minds of unsophisticated people, "Ltd" is a sign of size and economic power of the company rather than a warning for limited responsibility for debts. "Plc" generally tends to suggest public quotation when this is not legally so. A public company need not be quoted on the Stock Exchange.

41 Section 6(6)(b), The 1999 Constitution of the Federal Republic of Nigeria.

To sophisticated minds, these abbreviations suggest that the liability of members is limited to the amount unpaid for the shares they have acquired. It therefore follows that in event the company runs into difficulties, such uncalled capital would now be called. This may also be misleading especially where as it is the common practice, a subscriber has fully paid for all the shares on the same date that he acquired them. In such circumstances, the abbreviations are superfluous. These abbreviations may be meaningful for instance where a limited liability company may by special resolution determine that a portion of its uncalled capital shall not be capable of being called up except in winding up.⁴² This represents a kind of guarantee fund on which creditors may rely. Such part of the uncalled capital is called reserve capital or reserve liability.

Share Capital

Section 27(2) and (4) of the 2004 Act, suggest that contents of the Memorandum of Association relating to share capital depend on the type of company concerned. The unifying theme of the provision lies in the requirement for minimum or nominal share capital and minimum subscription. Private companies limited by shares must have at least N10,000.00 share capital,⁴³ while public companies are required to have authorized minimum capital of N500,000.00⁴⁴. Read along with section 99 of the 2004 Act, the requirement is that 25% of the authorised share capital must be subscribed before incorporation and not less than that amount must be taken up at all times during the life of the company. Subscription in this context simply means an undertaking to pay.

42 Section 144 Companies and Allied Matters Act, 2004.

43 Section 27(2)(c) Companies and Allied Matters Act, 2004.

44 *Ibid*.

By the provision of section 9, Insurance Act, 2004 (as amended) the minimum authorised paid up capital of Life Insurance Companies is N2billion, General Insurance Companies is N3 billion, composite insurance companies is N5 billion while Reinsurance Companies is N10 billion.⁴⁵

The provision has addressed the issue of under capitalization which has presented persistent difficulties in many jurisdictions. This approach is far ahead of the provision of the Companies and Allied Matters Act, 2004, which requires mere subscription and not paid up capital as is mandatory in respect of insurance companies.

In Nigeria, under-capitalization has been a convenient way of converting the limited liability company into an engine for fraud. Practically, it has virtually subverted the capital maintenance doctrine as a means of protection to creditors. In *Bornu Holdings Ltd v. Dipcharima*,⁴⁶ a limited liability company had only £2 in its account. In the circumstances it could not meet its financial obligations.

Par Values

The share capital must be divided into shares of a fixed amount.⁴⁷ What this means is that each share in a company shall be given a fixed value or par value. The implication for corporate policy is that no-par-value shares cannot be issued in Nigeria. Today, it is usual to issue shares at a premium even at the commencement of a company's life⁴⁸. In the circumstances a so called N1 share may be sold at N10 or more.

45 Financial Standard, Monday, November 13th 2006.

46 (1976) 1 SC 63.

47 Section 27(2)(a) Companies and Allied Matters Act, 2004.

48 Section 120, Companies and Allied Matters Act, 2004.

Furthermore, an issue of shares made after the company has gone into active business is usually done at a premium so as to reflect the company's underlying worth.

The result is that the arbitrary monitoring symbol attached to a share does not represent the real worth of the shares and consequently, its market quotation. This is apt to mislead unsophisticated investors who may be inclined to thinking that they are being cheated when they buy N1.00 share at N10.00 and they have cheated the company or got a better bargain if they obtain a N1.00 share at 80k or less.

Historically, par values were designed to provide a convenient measure of members' liability. Secondly, par values were also supposed to protect creditors at a time when it was thought that par values would be of a very large nominal value out of which a large amount would be left uncalled to provide a fund from which creditors would obtain payment in event of insolvency.

The reality of the situation today is that even at the beginning of a company's life, par values may be arbitrary and once a company goes into full operation, par values completely loose touch with the real worth of the shares. If a company makes losses, then its net worth goes down. This means that each share is worth less than its par value. On the other hand, if it had made profits and re-invested them, the shares would be worth much more than their par value.

In practice, the real market value of a share hardly corresponds with its par value. This makes par values totally artificial because they obscure the fact that a share represents an aliquot part of the net undertaking of the company. It therefore has

no real connection with its arbitrary face value as stated in the memorandum of association or statement of share capital⁴⁹.

The insistence on par values frontally detracts from the capital maintenance doctrine. Section 120 of the 2004 Act which permits the issue of shares at a premium requires that a sum equal to the aggregate amount or value of the premium must be transferred to an account to be called "the share premium account".

The share premium account is treated for most purposes including reduction of capital as if it were paid up share capital. Nonetheless, for purposes such as the annual financial statements, the paid up share capital and the share premium must be treated as two distinct items.

Furthermore, section 120 (3) of the 2004 Act permits the use of the share premium account to pay for bonus shares. A regime of compulsory no-par-value share in the Nigerian capital market is hereby advocated. In this wise, paid up capital and share premiums should be treated as one single item capital.

Registration by the National Insurance Commission

No insurer shall commence insurance business in Nigeria unless the insurer is registered by the National Insurance Commission of Nigeria.⁵⁰ The Commission shall not grant approval if it is satisfied that it is not in the public interest or interest of policyholders or persons who may become policyholders for

49 Hadden T. op cit PP. 224 – 231; Kuforiji A. A., No Par Value Shares in the Nigerian Capital Market (1986) N.L.J. Vol. 13 NO. 13 P. 73.

50 Section 4(1) Insurance Act 2004.

it to be granted.⁵¹ This subsection is ill couched. In the first place public policy is an unruly horse. For commercial sagacity, it is better to spell out the constituents of public policy.

Secondly the language of the subsection creates an impression that even before registration of an insurance company by the Commission, the proposed insurance company already has policyholders. This is totally misleading particularly in the face of the fact that the Commission has a right to refuse to register an applicant. Where an applicant is not satisfied with the decision of the Commission he may appeal to the Minister of Finance within 30 days⁵² of the refusal. The Minister shall within 60 days after the receipt of an appeal give his decision.

The reference to an "applicant" as an "insurer" is rather misleading. An applicant becomes an insurer when his application has been approved by the Commission. Even after incorporation with the Corporate Affairs Commission, the proposed insurance company remains "proposed" until a certificate of Insurance is issued by the Commission pursuant to the provisions of section 7 of the Insurance Act, 2004. It is after the certificate is issued that such a company can be meaningfully referred to as an "insurer" in law.

The Act,⁵³ requires that an application for registration as an insurer shall be made to the Commission in the prescribed form and be accompanied by a business plan and such other documents or information as the Commission may from time to time direct or require.

51 Section 4(2) Insurance Act 2004.

52 Section 4(2) Insurance Act 2004.

53 (1961) 1 ALL NLR 171.

“Such other documents” include a certificate of incorporation from the Corporate Affairs Commission pursuant to the provisions of the Companies and Allied Matters Act, 2004.

It is submitted that this approach is wrong in principle. Where the National Insurance Commission of Nigeria refuses to grant the application and issue a Certificate of registration to the applicant company, the Nigerian Community is left with a Shell Company more particularly where foreigners are involved.

The Act also requires that before registration, the Commission shall ensure that the name of the applicant is not likely to be mistaken for the name of any other insurer who is or has been insurer or so nearly resembling that name as to be calculated to deceive.

This accords with the common law principle in an action for passing off against any company which adopts or uses the name of an existing company thereby representing his business to be that of the complaining company. This is remediable by damages and/or injunction as was held in *Niger Chemists Ltd v Nigeria Chemists*.⁵⁴

Establishment of the National Insurance Commission

The Commission is established as a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.⁵⁵ The Commission may also acquire, hold, or dispose of any movable or immovable property for the purpose of its function.⁵⁶

⁵⁴ (1961) 1 ALL NLR 171.

⁵⁵ Cap N 53 Section 1(2) National Insurance Commission Act, 2004.

⁵⁶ Section 1(3) National Insurance Commission Act, 2004.

For managing and superintending the affairs of the Commission, a Governing Board is established.⁵⁷ It is observed from the composition of the board that the interest of insurance industry is not adequately represented. There is no representative of the Nigerian Insurance Association and the three part-time members only represent the interest of the public which by implication it can be said that they represent the policy holders.⁵⁸ It is submitted that emphasis should be placed on appointing members who are knowledgeable in insurance and insurance administration.

A member of the Board holds office for four years⁵⁹ and may be reappointed for one further period of four years and no more. A member of the Board can be removed from office on the grounds of misconduct or inability to perform the functions of the office on the recommendation of the Minister to the President, Commander-in-Chief of the Armed Forces. If the recommendation is approved, then such a member of the Boards office is declared vacant.⁶⁰

Functions and Powers of the Commission

The enabling Act provides that the object of the commission shall be to ensure the effective administration, supervision, regulation and control of insurance business.⁶¹ The Commission is also saddled with the responsibility to establish standards for the conduct of insurance premiums and commission, ensures adequate protection of strategic government assets

57 77.N53Section 2 National Insurance Commission Act, 2004.

58 Yerokun O. op cit P. 71.

59 Section 3 National Insurance Commission Act, 2004.

60 Section 3 National Insurance Commission Act, 2004.

61 Section 4 National Insurance Commission Act, 2004.

and other properties, regulate transactions between insurers and re-insurers, act as advisers to government on all insurance related matters, approve standards, conditions, and warranties applicable to all classes of insurance business, contribute to the educational programme of the Institute of Chartered Insurance and carry out such other activities connected or incidental to its other functions.⁶²

The question of “standards” for the conduct of insurance business appears elusive. The law should define standards and set clear-cut parameters. Furthermore, the provision that the Commission should ensure adequate protection of strategic government assets and other properties should be made clearer as to whether the Commission is to give adequate insurance protection or provide police security for the said properties. There is also no justification for limiting the protection to only government assets. The Commission is responsible for all the registered insurance companies in Nigeria.

The Commission is also required to publish for sale and distribution to the public annual statistics on the Insurance Industry.⁶³ The researcher made several trips to the Head Office of National Insurance Commission in Abuja and found to his dismay that such statistics are not published regularly. This function of the Commission is crucial since it touches on disclosure.

The Act also gives powers to the Commission to establish a bureau to which complaints against any insurer, re-insurer, insurance broker or loss adjuster may be submitted and by members of the public. This provision is a welcome development

62 Section 6 National Insurance Commission Act, 2004.

63 Section 8 National Insurance Commission Act, 2004.

and if practically implemented, the Commission shall also act as an insurance corporate ombudsman.⁶⁴

Conclusion

All over the world, the question of government intervention and in particular, regulation of economic activity, has attracted considerable attention for some years, especially, from those who think that government should keep out of business as much as possible. According to this school of thought, governments should concentrate on the management of the bureaucracy which is the essence of their existence in the first place.

One thing is clear, however, that governments usually take regulatory action when they believe that competition within an industry is either impossible or contrary to public interest or will lead to serious inefficiency in the use of resources or in the delivery of the goods/services of the particular industry, the aim being to ensure stability in the system.

With respect to insurance, there are various reasons why the system is regulated. These include the seriousness of the consequence of an insurance company becoming insolvent; the fact that the nature of insurance business is complex more particularly in relation to settlement of claims; the fact that unhealthy competition among insurance companies could be detrimental to the business especially in a developing economy like Nigeria; and the magnitude of funds involved and the tremendous impact that misuse or fraud could have on the public's confidence in the system and hence on the economy.

64 Section 8 National Insurance Commission Act, 2004.

In virtually all cases, the regulations have two main themes:- set rules of professional practice and ethical standards within the insurance market; and set rules governing the way insurance companies operate from capital requirements to methods of production and of selling their products.

Enforcement of laws in Nigeria has been historically weak.⁶⁵ The expectation in the exuberant formative years of policies has always been that there will be vigorous enforcement. Thereafter, rather than consolidate whatever are the initial gains of enforcement, the supervisory agencies simply relax their roles.⁶⁶

Under section 31, of the National Insurance Commission Act,⁶⁷ there is established an inspectorate Department saddled with responsibility for carrying out the supervisory functions of the National Insurance Commission in respect of insurance institutions. It is headed by a Chief Inspector and of significance is the obligation on the Department to authorise an inspection, examination or investigation of every insurance institution not less than once in every two years.⁶⁸ This certainly is without prejudice to such other rights as the right of access which the inspectors have at all times to the bonus, accounts documents and vouchers of an insurance company.

The greatest challenge that will face the Inspectorate Department and ultimately determine its success or otherwise are the vices of official corruption and commercial bribery. The

65 Section 8 National Insurance Commission Act, 2004.

66 Fagbohun O. A. Some observations On The New Regulatory Developments In The Insurance Sector. In Fagbohun O. A. (ed) Development and Reforms of Nigeria's Commercial Laws, Essays in honour of Chief (Dr.) Chris Ogunbanjo (OFR). C & A Prints (Nig.) Ltd Lagos, 1998 P. 628.

67 Ibid.

68 Section 31(2)(a) National Insurance Commission Act, 2004.

existence and extent of bribes, kickbacks and pay-offs is not easy to determine. Thus, through the offer of bribe, a responsible corporate official may be persuaded to overlook deficiencies or irregularities.⁶⁹

That notwithstanding, the real importance and benefits of the inspection process lie in the use that will be made of the report expected from it. After the Board of the Commission has considered the report of the inspectors and made its recommendations, the report is expected to be forwarded to the institution concerned with specific instructions for its consideration.⁷⁰ The institution has 14 days to react to the report giving details of its proposals for implementing the recommendations. In the event of default, aside from the fine of N2,500 upon conviction for every day of the offence, the Commission may suspend the registration of the institution where the offence continues for more than 60 days.

There are several grounds upon which the Commission may exercise its powers of intervention. The Commission will intervene to protect policyholders or potential policyholders against the risk that the insurance institution may be unable to meet its liabilities. Another situation is where the insurance institution has failed to satisfy an obligation to which it is subject under the Act or where it appears that an institution has furnished misleading or inaccurate information to the Commission.⁷¹ The nature of the intervention is either that the Commission will require an insurance institution not to make investments

69 Section 31(1) National Insurance Commission Act, 2004.

70 Fagbohun O. A. *op cit* P. 269.

71 Section 34(1) National Insurance Commission Act?

of a specified class or description or to realize within a particular period the whole or a specified proportion of investment of a specified class or description.

These measures may work depending on the stability of the political system in general. There is very little regulation can achieve if the political system itself condones corruption.

Chapter Seven



Towards a Better Administration of Criminal Justice in the 21st Century Nigeria

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Abstract

This write up seeks to examine the role the courts have been playing in the administration of criminal justice in Nigeria, and what can be done to put the courts in a better position in the administration of criminal justice in the country. The work begins with conceptual clarifications, and examines the power vested in superior and inferior courts in the trial of criminal cases. It also identifies the relevant parties in the Administration of Criminal Justice in Nigeria. It further outlines the basic principles of criminal justice system of Nigeria, encapsulated under the right to fair hearing of the Nigeria's constitution. It identifies those legal and extra-legal factors that constitute an inhibition in the smooth administration of criminal justice in Nigeria. The paper then terminates with suggestions that the writer considers vital in the enhancement of criminal justice administration through out the established criminal courts in the country.

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Conceptual Clarifications

The term “criminal” is an adjectival formulation from the word crime. Crime is any act or omission of any member of a community or society which is contrary to the existing Code of Conduct provided by any sovereign authority in that community, and for which sanctions are provided thereof. In Nigeria, the sovereign authorities that have the legal power to enact a Code of Conduct that prohibits certain behaviour or omissions are the Federal Government of Nigeria, the various State Governments in the Federation, Local Councils and the Traditional Authorities. The word “Administration” on the other hand, means to do, carry out or apply. “Justice” according to the Blacks Law Dictionary is the fair and proper administration of Laws.¹ The court on the other hand is an institution of Government established by the state to determine disputes or controversies arising between persons and persons, and between private persons and the state officials. It also has the power to interpret and decide on questions of Law. As defined by William J. Hughes – “A court ... is a permanently recognized body with independent judicial powers, defined by Law, meeting at a time and place fixed by Law for judicial public administration of justice.”² Nigeria, the area chosen for this study is one of the independent geopolitical conglomerate found in the West-African sub-region. It has sovereign Authority to enact Laws that restrict, regulate and punish certain criminal behaviour throughout its geopolitical entity.

From the early life of humanity, certain actions were considered inimical to the peaceful coexistence and interaction of

1 (USA: Thompson West Publishing Co, 1999) P.881.

2 (William Hughes, Federal Practice Jurisdiction and Procedure (1931) p.7 & 8 or Blacks Law Dictionary, Ibid at p.378).

individuals in the community. That is why, God realizing the danger of criminal acts or omission in the relationship of man, his properties and his security in any environment he lived, dictated to Moses such divine injunctions like, "thou shall not steal, thou shall not commit adultery and thou shall not kill, etc., contained in the Holy Bible.³

From thence, attempts have been made by many existing sovereign authorities from one historical epoch of man to provide a Code of Conduct in each society that prohibits certain actions and attaches sanctions to the contravention of such a code. On this point Adeyemi relying on the words of Terrence Morris said "crime" is what the society says it is by establishing that an act is in violation of an exiting criminal law. Without Law there can be no crime at all".

The idea of establishing courts for the dispensation of criminal justice dates back to the days of Israelites in the wilderness with Moses, and the visit to this prophet by his father- in law Jethro. Jethro perceiving the arduous task surrounding Moses in trying to tackle all problems of Israelites personally, without any delegation of duty, gave the following advice to Moses on administration of justice:

Appoint judges and other officials in every town that the Lord your God gives you. Those men are to judge the people impartially. They are not to be unjust or show partiality in their judgements; and they are not to accept bribes, for gifts blind the eyes even of wise and honest men, and cause them to give wrong decisions. Always be fair and just, so that you will occupy the

3 The Holy Bible, New International Version, Exodus 20:12-17.

land that the Lord your God is giving you and will continue to live there.

In the Holy Quran too, Allah again gave the same instructions to Prophet Mohammed in surat iv verse 135 that:

O ye who believe, stand out firmly for justice, as witnesses to God even as against yourselves, or your parents, or your kin's and what ever it be (against) rich or poor; for God best protects both; for now not the lust (of your hearts) lest, ye swerre, and if you distort (justice) or decline to do justice, verily God is well acquainted with all you do.

The above represents the origin of courts and the importance of administration of justice. In our modern times learned Judges or Jurists like Hon. Justice Oputa (JSC), in his lecture in 1999 stressed the need to administer justice according to law to all manner of persons when he advised that:

To retain public confidence in the system, the administration of Justice in the courts should, above all things else, be pure, incorruptible and just, otherwise we dispense a counterfeit. Justice in our courts should not be a marketable commodity blatantly auctioned, with the hammer going to the highest bidder. Such an auction sale of justice, defaces, disfigures and debases the beautiful effigy of elegant and relentless justice.⁴

The above statement of the learned Justice stresses that justice at all times must be in accordance with the letters of the laws or else it will no longer be justice, but something.

⁴ Oputa, Judicial, Ethics, Law and the Judiciary" being a paper delivered in a lecture for Continuing Education for the Judiciary in 1999.

What is termed "Administration of Criminal Justice," is better defined by Hon. Justice Igoche, "as the whole process of handling crime from its commission to when the individual offender is dealt with according to Law."⁵ Therefore, the administration of Criminal Justice covers the mode of arrest of the offender by the police, the steps followed by the court in the course of his trial, the type of judgment handed down against him and while in prison, how is he treated in detention by the prison officers.

Therefore, for an accused to be arrested, his act or omission must have been found to have contravened an existing law of a recognized sovereign entity in the state. It is, in this respect that section 36(8) of Constitution of the Federal Republic of Nigeria, 1999 stipulates that:

*No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence more than the penalty in force at the time the offence was committed.*⁶

The courts in Nigeria have acknowledged and enforced the above principle in the Constitution in a number of cases.⁷ In the Federation of Nigeria, the Criminal Code was promulgated to deal specifically with criminal behaviour as stipulated in section 2 as follows: "An act or omission which renders the person doing the act or making the omission liable to punishment under this Code or under any Act, or Law, is called an offence."

5. Igoche T. A, The Role of the Court in the Administration of Criminal Justice being a paper presented at a symposium organised to celebrate the 2010/2011 Legal year of The Benue State Judiciary on 19th – 21st September, 2010 at p.3.

6 (Section 36(8) of Constitution of the Federal Republic of Nigeria, 1999).

7 *Tofi v Uba* (1987)3 NWLR (pt782) p.707; *Aoko v Fagbemi* (1961) ALL NLR, p.48.

In the same vein, the Penal Code Law of Northern Nigeria, 1963 now the Penal Code Law of Benue State, Revised Edition⁸ defines an offence to be: in section 28, "Except where otherwise appears from the context, the word offence includes an offence under any law for the time being in force".

Therefore, for any act to be regarded as a crime or an offence triable in court of law, the act must be violative of an existing law, for without law, there can be no crime at all.

Criminal Courts in Nigeria with their Jurisdictions

The judicial powers of criminal courts in the Federation and the States are respectively conferred on the courts established for the Federation and the respective States in the Constitution. To this effect, section 6(6) of the Constitution of the Federal Republic of Nigeria, 1999 stipulate that:

The judicial powers vested in accordance with the foregoing provisions of this section:-

Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law; Shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all actions and proceedings relating therefore, for the determination of any question as to the civil rights and obligations of that person.

The various Criminal Procedural Laws such as the Criminal Procedure Act, and the Criminal Procedure Code also vest in certain courts the power to try criminal cases.⁹

⁸ (Cap 124 Laws of Benue State, 2004).

⁹ Section 57 of the Criminal Procedure Act, 2004.

The Criminal Procedure of Benue State,¹⁰ has vested the below criminal courts with jurisdiction and power to try criminal cases.¹¹ It provides that: There shall be eight classes of criminal courts in the state namely:

- The High Court
- Court of Chief Magistrate of First Grade
- Courts of Chief Magistrate of Second Grade
- Courts of Senior Magistrate of First Grade
- Courts of Senior Magistrate of Second Grade
- Courts of Magistrates of the First Grade
- Courts of Magistrates of the Second Grade
- Area courts established or deemed to have been established in the state under the Area Courts Law.

The criminal jurisdiction of State High Courts is also extended under the Advance Fee Fraud and Other Related offences Act.¹²

From the above, it is apparent that the courts are legally recognized as institutions that can play a central role in the administration of criminal justice in Nigeria.

There are certain basic principles of criminal justice accepted through out the Anglo-saxon legal systems and also incorporated as part of the Nigerian Constitution, and adjectival laws on crimes. For instance, section 36 of Constitution of the Federal Republic of Nigeria, 1999 encapsulates these principles to include:

10 (Cap 51) Laws of Benue State, 2004).

11 Section 4 of the Criminal Procedure Code of Benue State, 2004.

12 No 35, 2006.

- Fairness and impartiality
- Presumption of innocence
- Right to be informed in the language understood by the accused concerning the nature of the offence
- Adequate time and facility in the preparation of defence
- Right of representation by counsel of his choice
- Right of examination of witnesses called by prosecution in person or via his legal representatives
- Right to record of proceedings
- Plea of *autrefois acquit* and *autrefois convict*
- Plea of pardon
- Right against double jeopardy.

There is in addition to the above the right to appeal against the decision of the lower tribunal to the higher tribunals for judicial review and the use of the *literal* rule in the interpretation of penal statutes.

The above, represents the basic rules that regulate the steps taken by a judge in the adjudication of criminal cases in his court. The role of a judge presiding over criminal cases always is, to ensure that justice is done to the accused according to the letters of the laws. Hon. Justice Aniagolu, explained the rationale for the fairness and reasons why a Judge must be just in his decision at all times in the following words:

A Judge who does not believe in even handed justice and does not bother to work hard to achieve it, who deliberately strays away from the path of rectitude, who panders, in the words of Honourable Thurgood Marshall, Justice of the Supreme Court of America,

to the sirens of power and influence in the discharge of his judicial duties is wrecking society from the very roots and is committing a judicial coup d'etat on the constitution.

In the trial of offenders before the criminal courts, some Judges have put up certain behaviours that constitute an affront to justice. These ranges from outright denial of bail by the court, the descending of the judge in to the arena of the case by unconsciously or deliberately taking over the role of the prosecutor, or granting bail on onerous terms etc.

For instance, in *Eyu v. State* an accused was granted bail on condition that she must deposit N400,000 with the registrar of the court and to enter into a bond in the sum of N5000, with one surety in the like sum. The accused, appealed against the bail terms imposed by the court and the appellate court found the terms of bail to be excessive and substituted them with moderate terms. By rejecting excessive terms for bail the court was saying that onerous term for bail in fact amounts to the denial of the bail.

In *Dunu v. Commissioner of Police*¹³ a senior magistrate of Benue State erred in Law when he shifted the onus of proof in criminal trial on the accused to prove his innocence. He was reminded by Umuru Eri J in the below words: "ours is accusatorial and not inquisitorial system – a system in which the state must establish the guilt by evidence independently and freely secured, and not by the kangaroo method adopted by the trial court".

13 (1985)6 NCLR p.691 at 693.

In the case of *Uso v. Police*,¹⁴ the accused was charged with stealing. At the trial, the trial magistrate took over cross-examination from the prosecutor in the case and cross-examined the accused person at length. The accused was convicted. On appeal, the Supreme Court held that the magistrate erred in Law in taking over the conduct of the case.¹⁵ There are cases in some states, where mischief in the exercise of judicial functions makes some Judges sentence an accused person without records of proceedings supporting such a conviction and sentence. There are also situations in which some Judges have written two judgments in one case, only to deliver the desired one as the situation presents itself. Corruption and abuse of judicial powers have made some Judges indulge in judicial rascality or impertinence in the performance of their judicial functions. A typical example of judicial impudence arose in the case of *Dahaltu v Turaki*,¹⁶ in which a Judge of a High Court refused to follow or abide by the principles decided in the Supreme Court case of *Onuoha v Okafor and Others*,¹⁷ even when the case was cited to the Judge and his attention drawn to the established principles. The Judge asserted his jurisdiction over the supreme court, thereby refusing to be bound by its reasoning and directed the supreme court to "reamend its position in the above case", whenever a similar situation presents itself before that court. Castigating the behaviour of this Judge, Justice Katsina-Alu, referred to the Judge as "a miss fit in the judiciary," while Kutigi J. S. C described the Judge's action as "gross insubordination", judicial rascality" etc.,¹⁸

14 (1972) 11 SC, p.37.

15 *Koduwa v State* (1988)4 SC, P110; *Onuoha v the State* (1989)2 NWLR (pt101) p.23.

16 (2003)5 NWLR (pt 893, p.310).

17 (1983)4 NSCL p.494).

18 *Ibid*.

From the above, the criminal justice system of Nigeria has continued to suffer from legal and extra-legal factors, which constitute an inhibition to its smooth administration or application.

Some of these extra-legal factors cover Judges without the desired attitude and behaviour to work. Commenting on the impact of a judge or magistrate that lacks the qualities of adjudicating over criminal cases, Hon. Justice Aniagolu admonished in a paper presented at All Nigeria Judges Conference of 1999 as follows:

A Judge who does not believe in even handed justice and does not bother to work hard to achieve it, who deliberately strays away from the path of rectitude, who panders in the words of Honourable Thurgood Marshall, Justice of the Supreme Court of America, to the sivers of power and influence in the discharge of his judicial duties is wrecking society from the very roots and is committing a judicial coup d'etat on the constitution. He is committing an act equivalent to that of armed saboteurs but the only difference is that he is over-throwing society, not by direct armed conflict, but by corrosive means, namely that of undermining society, for its eventual break down by the insidious method of effecting its decay from within. In addition to striving to do justice and being fair minded, a Judge must be knowledgeable, industrious, hard working, independent and above all God fearing....

From the above quotation, the qualities enumerated above and demanded of a Judge are essential in the administration of criminal justice, without which, the administration of criminal justice is affected in many ways.

Another nagging and intractable problem confronting the administration of criminal justice in the 21st century Nigeria, is, the delay of cases pending before the courts vested with criminal jurisdiction. This delay is caused by the uncooperative attitude of police officers prosecuting criminal cases before the court, flimsy excuses advanced by legal practitioners for not being prepared to conduct the criminal cases they handle before the courts. Next are prison officers that keep custody of detainees and refuse to produce them before the courts on the required dates.

Admitting the above facts Honourable Justice Umaru Eri, Administrator of the National Judicial Institute supported the above point in these words:

One of the most nagging and intractable problems being faced is that of delay. The problem has become perennial often leading to frustration and disenchantment with the system. There is a tendency in some quarters to hold the judiciary entirely responsible for this delay, while I can not completely exonerate the judiciary, I can confidently assert that it is not 100% guilty. It seems clear to me that the problem of delay in the court cannot be effectively tackled until there is a realization that the bench, bar, police and the prisons are together.

From the above, it is glaring that the uncooperative attitude and behaviour of the police, members of the bar, and prisons have been a militating factor in the administration of criminal justice in Nigeria. Also exuding to the public expectation on the role played by the courts in administration of justice the **Guardian Newspaper of Thursday October, 2002** entitled "cleansing the judiciary" at p.18 captured in its Editorial column thus:

For the judiciary to truly remain in our eyes and consciousness as the bastion of hope for the common man, those who administer justice must be squally clean. They will always be human alright, but the peculiar demands of their job require that they overcome most of human frailty. Those who can not, or are unwilling to, should be eased out to maintain the sanity of the temple and to reassure all who seek justice that they will be dealt by honest ministers....

Hon. Justice Oputa emphasizing the need for upright judges in administration of justice in his paper titled, "Judicial, Ethic, Law, Justice and the Judiciary" in 1999, emphasized that:

A Judge without conscience is an odious and pernicious character, the greatest venom, the greatest curse to afflict any nation. Judicial ethics demand that all Judges (magistrates) are men of conscience. It is far better to have a conscious man of average intelligence on the bench than a genius who is corrupt and without conscience.

Another practical militating factor in the administration of criminal justice is the environment designated as court room for Judges to sit daily in the Administration of Justice. A survey of buildings/structures provided by the state as courts presents a picture of an eye sore. Most of the buildings used as courts are either dilapidated or ravaged by activities of bats or are torn as a result of natural wear and tear.

The places specified as chambers for some Judges to retire for the writing of rulings and judgements are equally not conducive, nor comfortable for rest from strenuous official duty in open court etc. Examples of such courts are the Grade I Area Court Katsina-Ala in Benue State, and Danancha in Taraba State.

The persistent picture of the dilapidated nature of the structures used as court rooms makes one wonder why this has become a recurrent decimal. The next question that confronts ones mind is whether the Judicial arm of Government has been compiling and submitting its Annual budget to the federal and state governments. If it has, why have the Federal and State Governments persistently paid deaf ears to the sorry state or nature of some of the courts, in the country.

It must be borne in mind that a conducive environment used as a court room is likely to enhance the productive capacity of any presiding Judge or Magistrate posted to such a court.

Next is lack of supply or provision of basic tools or facilities to some of the courts that administer criminal justice in the country. To people who are conversant with the Nigerian court system, whether as litigants, police officers, members of the bar and bench etc., the neglect of the courts in Nigeria has attained a level where presiding Judges or Magistrates are not supplied with writing implements like pens and foolscap sheets in some states. Thus, a litigant or counsel who desires his client's case to proceed, must make available these tools to the court.

The true picture of most courts in the country indicates that they lack the basic working tools like typewriters, computers etc. A party who desires to have a short proceeding or full proceedings of a court is made to pay through his nose. Because of the absence of the court may discover that such proceedings of court are type openly in the local markets squares or towns, and as a result, some of the pages are missing or the file in which evidence is taken is completely lost. Failure on the part of the state to provide these basic working implements to the court has hiked up corruption in the Registry of some of these courts.

It is sad that in the 21st century Nigeria of today, the use of computers and other internet services are yet to be extended to most of the courts in the country.

It is also sad that, the Nigerian courts are not being exposed to modern scientific appliances being used in many private and public establishments in the world today.

For administration of criminal justice in Nigeria to go beyond the position it is now, the welfare of all persons presiding over the criminal courts in the country must be looked into. On the issue of welfare, mention must be made of wages, salaries and other benefits of office, such as, official cars and accommodation. The situation where in addressing the problem of salaries of judicial officers, emphasis is placed on salaries and wages of Judges of Superior Courts is unjustifiable. The State or any person with the power to give these emoluments must bear in mind that the bulk of criminal cases are decided in the lower courts. Besides, Judges of the higher and lower courts are regulated by same market forces.

Today, in most states in the country, official accommodations are made available only to Judges of superior courts leaving the magistrates and Area Courts judges to accommodate themselves. Also while all justices of Superior Courts have official cars assigned to them and are also chauffeur-driven, in most States across the Federation, most of the Judges of the Magistrate and Area Courts do not have official cars. It also remains a daydream for them as to when they will be chauffeur-driven.

The State must bear in mind that the principle of equality before the Law, which all the courts enforce will appear like the drunkard song, if it is not permitted to apply in the area of

the welfare of Judges of the Superior Courts and those of the Lower-Courts in Nigeria.

One emerging legal problem confronting the administration of criminal justice in Nigeria today, is the issue of plea bargaining which Superior Courts of record have resorted to in the trial of corrupt public officers who are accused and are tried of official corruption. It is a practice where a prosecutor arranges to settle a case against an accused in exchange for certain concessions. Under this process, an accused is made to receive a lighter sentence for the offence he has committed in exchange for pleading guilty to a lesser part of the charge and the Judges are empowered to give a sentence lower than the one prescribed under the Law,¹⁹ unless a mandatory sentence or a minimum sentence is prescribed by Law. Some Judges in Nigeria have abused the practice of summary conviction, under which the accused is required to admit to every ingredient required for the offence for which he is charged, before he can be convicted for the offence for which he is charged. The use of plea bargaining by the court to compromise cases for which men of high standing in Nigeria are involved is unconscionable.

Plea bargaining constitutes a big legal problem, in that it constitutes a violation of numerous fundamental right principles of the accused, such as the right to full-trial, presumption of innocence, privilege about self-incrimination and the right to examine witnesses called by the prosecution.²⁰ A survey of the criminal procedure laws of most states across the country, shows that it is not provided for except under section 75 of the Administration of Criminal Justice Law of Lagos State, 2007.

19 *SCAP v Attorney-General of Federation* (1988) NMCR, 326.

20 Section 36(4) (5) and (11) of Constitution of Federal Republic of Nigeria, 1999.

Solutions for a Better Administration of Criminal Justice in Nigeria

For the courts to perform their task of interpreting and enforcing the Law against criminal offenders in Nigeria the following measures must be evolved by the state:

Persons appointed as Judges of the Superior Courts and those recruited in the Area and Magistrate courts must be those who are competent and conscious of their official duty and are prepared to discharge their judicial functions with the fear of God. They must also be persons who and are prepared to shun all temptations and influences from all angles to indulge in the miscarriage of justice.

There should be constant supervision and check on the official attitude and private behaviour of those appointed as Judges of the superior and inferior courts from time to time to ensure that they keep to the Code of Conduct provided in the Constitution for public officers as well as the one established solely for judicial officers.

To promote the happiness and welfare of those appointed as justices of the superior courts and those recruited for the lower bench, the state must make it a matter of policy that official residence and cars are provided for Judges of the Area Courts and Magistrate Courts.

To ensure the efficiency of the Lower Courts and Higher Courts in administration of criminal Justice, they should be provided with the required working tools or facilities such as foolscap sheets, typewriters and even computers for the purpose of quick production of record of proceedings as demanded by litigants, legal-practitioners for the purpose of taking a necessary step in any criminal trial or proceedings.

There should be a change in attitude and behaviour of some legal practitioners, who indulge in flimsy excuses resulting into unnecessary delay in a criminal proceeding or trial. The prison officers or police officers who investigate crimes and produce offenders before the courts must also turn a new leaf and adopt a cooperative attitude to the courts to ensure that justice is achieved for the accused, the society and the state.

On the solution respecting the practice of plea bargaining, it is clear that so far, only Lagos State has accorded legislative succour to this practice in section 75 of the Administration of Criminal Justice Law of Lagos State, 2007. If the practice has been found to be useful in the administration of criminal trials, then other states in Nigeria should also be encouraged to follow the footsteps of Lagos State in this direction.

Chapter Eight



Insider Dealing by Company Directors and the Nigerian Capital Market Issues and Perspectives

Iorun, Nicholas Iorember Esq.*

Introduction

The Securities market occupies a very important position in every free market economy. It is a place where securities (shares, in this context), are offered for sale and therefore, a good source of corporate finance. However, dealings in securities are often fraught with manipulations and market abuses. Frequent occurrence of cases of flagrant misuse of insider information by directors and/or officers of companies abound, and there has been a continuing series of cases in which specific allegations of improper conduct by insiders and their confederates exploit their privileged position and have easy access to price sensitive confidential information to the disadvantage of the entire market or the individuals with whom they transact.

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It is possible for the price of shares in a bid – for company to rise sharply before the announcement of a takeover bid which is in itself evidence of 'inside' buying.¹

Market transactions in Enron Corporation in August 2001 present a good example of directors' contravention of their sacred duty (fiduciary duty) through insider dealings. The Chairman of Enron Corporation sold 93,000 of his shares in the company netting \$2m. In the same period, the Chief Executive Officer also made \$15.5 million from the sale of his shares while encouraging the company's employees to invest more in Enron's stock.²

In Nigeria, the Securities and Exchange Commission suspended Nova Finance Securities on March 26, 2009 after investigations uncovered unethical practices of insider dealings. This triggered a probe into Afribank Registrars as it was accused of aiding and abetting the unethical practices in Nova Finance Securities. The allegation was that Dangote Plc and Nova Finance Securities with the assistance of Afribank Registrars were involved in African Petroleum (AP's) price manipulation saga as they were said to have swapped a total volume of 500,000 units of irredeemable non-cumulative convertible preference shares in ten (10) different transactions which were admitted to the daily official loss of the Nigerian Stock Exchange. This according to the management of African Petroleum (AP) caused a panic and loss of share values.³

1 The *Economist*, 13 May, 1967 .

2 Agom, A.R., "Lessons from the Burst of Enron and the Challenges of Securities Regulation" in *Ahmadu Bello University Journal of Commercial Law (ABUJCL)* Volume 2, No. 1, 2003-2005, p.151.

3 *Vanguard Newspaper*, September 26, 2009.

Similarly, an interim report of the Forensic Audit Commission by the Securities and Exchange Commission alleged that N1.6 billion was spent on dubious Coral property.⁴

The Nigerian Stock Exchange itself was accused of engaging in insider dealings through NSE Consult, one of its wholly-owned subsidiaries. The report confirmed that the Exchange transferred money to the Consult for the purpose of trading and investing.⁵ The founding directors of the company were the erstwhile Director-General of the Nigerian Stock Exchange who at the time of its incorporation in 1984 held 250,000 of the 4.4 million shares in the company.⁶

Knowledge of a company's state of business and the board's intention, to the exclusion of the public, may therefore prompt either a hasty acquisition or disposal of its shares by an insider in order to gain or avoid loss. This is illegitimate informational advantage.

It is, however, axiomatic that market confidence exists only if traders believe that market prices reflect the true value of what is bought and sold. Correct pricing is more likely if both buyers and sellers have all the relevant information to hand, and public confidence in the market is easily damaged if people close to the company use inside information about the company to revalue the shares ahead of the market, and trade on that privileged basis.⁷ Public confidence is also damaged if false

4 Kingsley, R. "Fraud at the Nigeria Stock Exchange", *Guardian Newspaper*, Wednesday August 18, 2010.

5 Aluko and Olabode, "SEC Probes Culpability of Nigeria Stock Exchange Consult in Insider Trading" <http://www.alukoolabode.com> Nigeria stock exchange 9 articles authors/ Nigeria stock exchange investigates stock.com (downloaded 23/12/2010).

6 *Ibid.*

7 Sealy, L. et al., *Cases and Materials in Company Law*, 8th edition (New York: Oxford University Press, 2008) pp.593-594.

information about the value of shares is spread, creating a false market (this is known as market manipulation).⁸

No doubt, insider dealings can adversely affect the securities market and decrease the company's reputation and adversely affect its economic base with a spill-over effect on the entire economy.

The pertinent question is whether it is good for directors or persons who have a fiduciary duty to the company and have privileged knowledge of its share performance in the capital market to take advantage of that position.

This article examines the menace of market abuse by company directors and their control. In doing so, the paper discusses theories of insider dealing, bringing out clearly the arguments for and against its prohibition. Regulation of the practice and its conceptual basis is also considered. From the arguments and the basis of regulation, legal and economic imperatives of insider dealing are distilled. Finally, the scope of the law regulating insider dealing in Nigeria with a reflection on the state of the law in other jurisdictions is examined and suggestions for reforms made.

Definition of Concepts

The law regulating company securities in Nigeria is the Investment and Securities Act (ISA)⁹ which has defined key terms relevant to this discourse.

⁸ Ibid.

⁹ No. 29, 2007.

Dealing in Securities

By the Act,¹⁰ “dealing in securities” means (whether as principal or agent) making or offering to make with any person, or inducing or attempting to induce any person to enter into or to offer to enter into:

- a. any agreement for or with a view to acquiring, disposing or subscribing for, or underwriting of securities; or
- b. any agreement for the purpose or pretended purpose of securing a profit to any of the parties from the yield of securities or by reference to fluctuations in the price of securities.

Insider

This is defined by the Act¹¹ as:

- a. any person who is connected with the company in one or more of the following capacities:
 - i. a director of the company or a related company;
 - ii. an officer of the company or a related company;
 - iii. an employer of the company or a related company;
 - iv. an employee of the company, involved in a professional business relationship to the company;
 - v. any shareholder of the company who owns 5 percent or more of any class of securities or any person who is or can be deemed to have any relationship with the company or member.
 - vi. members of audit committee of a company; and
- b. any of the persons listed in paragraph (a), who by virtue

¹⁰ Ibid, Section 315.

¹¹ Ibid .

of having been connected with any such person or connected with the company in any other way, possesses unpublished price sensitive information in relation to the securities of the company, and any reference to unpublished price sensitive information in relation to any securities of a company is a reference to information which:

- i. relates to specific matters relating to or of concern (directly or indirectly) to that company, that is not of general nature relating to or of concern to that company; and
- ii. is not generally known to those persons who are accustomed to or would be likely to deal in those securities but which would, if it were generally known to them be likely materially to affect the price of those securities.

From the above definition, an insider is a person in possession of unpublished price sensitive inside information in relation to securities of a company. The definition is broad enough to cover professionals like lawyers, auditors, valuers, investment analysts, et cetera, who are employed and engaged in a business relationship with the company. It also covers persons who may have controlling rights in any class of securities, members of the audit committee and any person deemed to have a relationship with the company or member. This latest category could be a tippee. The inclusion of all these categories of persons in the definition is commendable because of their access to or possibility of access to the company's records and its affairs. The inside information is in relation to specific and not general matters relating to the company which is generally unknown to those persons who are accustomed to deal in or would be

likely to deal in the securities which if the information were known to them, would have materially affected the price of those securities.

One would argue that with the divorcement of ownership from control and marginalisation of shareholders by the board through dominance of the general meeting, the latter will not have access to inside information. Since the 1960s, there has been a partial re-concentration of share holdings in the hands of institutional shareholders, especially pension funds and insurance companies.¹² These large institutional share holders either as a general practice or in special circumstances, keep in close touch with the largest companies in their portfolios and are likely to gain access to inside information.¹³ Principal shareholders are, by virtue of their substantial share holdings, potent and unscrupulous ones do manipulate the destinies of their companies in a manner akin to insider trading.¹⁴

It is a welcome development that the ISA has included a shareholder who owns 5 percent or more of a class of securities of a company, because this will cover institutional shareholders and principal shareholders though not specifically named by the Act, but by the ISA.¹⁵

12 Davies, P.L., Gower and Davies' Principles of Modern Company Law, 8th edition, (London: Sweet and Maxwell, 2008) pp.423-430

13 Aspin, J.O., "Regulation of Insider Dealing under the Companies and Allied Matters Act" in *The Journal of Nigerian Law*, Volume 2, No. 1, 1993, p.63

14 Ibid.

15 No. 29, 2007, Section 315.

Insider Dealing

'Insider dealing' includes insider trading and occurs when a person or group of persons who being in possession of some confidential and price sensitive information not generally available to the public, utilizes such information to buy or sell securities for the benefit of himself, itself or any person.

The terms 'insider dealing' and 'insider trading' are therefore used to describe the use (or rather the misuse) of confidential information by people who, as company officers or employees, avail themselves of knowledge which they acquire in the course of their work or by reason of their own office, to deal to their own profit in the company's securities.¹⁶

The information is usually known to the acquirer but not generally and is acquired by virtue of his position to trade to his advantage in the securities of a company.¹⁷ The practice is not limited to directors but can be engaged in by anyone who has access to price sensitive information. It is convenient, however, to discuss insider dealing in relation to directors since as a matter of practice directors have most access to this information and are most likely to deal or 'tip' other persons to deal on the strength of it.¹⁸

Arguments for and Against Regulation of Insider Dealing

The phenomenon of insider dealing which was pioneered by the United States of America has become a topical issue in the field of corporate management and investor protection.¹⁹ The

¹⁶ Sealy, L. et al., op. cit. p.594.

¹⁷ Farrar, J.H. et al., Farrar's Company Law 2nd edition (London & Edinburgh: Butterworths, 1988) pp.364-365.

¹⁸ Ibid, p.365.

¹⁹ Agom, A.R., op. cit. p.151.

question of control over insider dealing has consequently become a matter of general concern to jurisdictions, the world over, and has generated a lot of debate in the last few decades.²⁰

Those who argue for prohibition see the practice as being contrary to the demands of fidelity, efficiency and equity.²¹

The fidelity argument looks at the problem from the point of view of the source of the information and the position of the person utilizing it. This view is not different from that expressed in the no-profit cases.²² It is argued that because the insider has acquired it from the privileged position he occupies, loyalty to the company should preclude him from taking that information which belongs to the company and using to his advantage. Further, as a fiduciary to the company, his profit therefrom is incompatible with his sacred duty.²³

Insider dealing is said to be commercially immoral and abhorred by commercial law.²⁴ The argument for regulation of insider dealing is that, to give insiders a free hand to exploit corporate information and deal in their company securities could lead to undue manipulations not only of the securities market which is the immediate target, but ultimately of the entire corporate set up.²⁵ This is so because the urge to maximize profit may be so strong that the principal officials, into whose hands the company has been entrusted, may compromise

20 Hadden, T., *Company Law and Capitalism* (London: Weidenfeld and Nicolson, 1980) p.347; Asein, J.O. op. cit. P.56.

21 Brudney (1979) 93 Harv. L. Rev 322 at 344.

22 Farrar, J.H. et al., op. cit. P.365.

24 Agom, A.R., op. cit. p.152.

25 Olawoyin, G.A., *Status and Duties of Company Directors* (Ife: University of Ife Press, 1977) p.147; Agom, A.R. op. cit. p.152.

corporate interests for the sake of anticipated private gains.²⁶ A good example is where vital information that could benefit the company and its shareholders may be withheld for purely selfish reasons as in *SEC v. Texas Gulf Sulphur Company*.²⁷ In that case, the Texas Gulf Sulphur company struck rich mineral deposits in preliminary drilling operations. A number of officials and employees of the company and their associates bought shares and rumours of a major strike became rife. The company then issued a press release discountenancing the rumours and stating that to issue details of the prospects would be premature and possibly misleading. The SEC took proceedings against the company and its officers and employees seeking an injunction against further violations of Rule 10(b)(5), rescission of all share contracts entered into by insiders, and compensation for those who had sold the shares affected. It was held that the company had been in breach of the rule in issuing the press release, as had those who had purchased shares or given tips to others. The issue of compensation was differed, but it was implied that those responsible for making the public statement to investors might be liable to market buyers if such observations are false or misleading or are incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes.

The decision in the Texas Gulf Sulphur case aligns with the view of Cary,²⁸ to the effect that the practice of insider trading amounts to double compensation as the official involved would have benefited covertly from an office for which he was already adequately compensated.

26 Asein, J.O., op. cit. p.63; Agom A.R, op. cit. p.152.

27 (1968) 401 F.2D 833.

28 Cary, W., "Corporate Standards and Legal Rules" (1962) 50 Cal. L.R. 408 at 415.

Insider trading prohibitions are therefore based on English Common Law prohibitions against fraud and the need to forestall a person from gaining from the use of information acquired in the course of performance of a duty for personal advantage. Thus, decisions like *Regal (Hastings) Ltd v. Gulliver*^{28a} and *Boardman v. Phipps*,^{28b} might be used as authority for making directors, and others similarly placed, liable to account to their company for any profit that they made, and indeed that is very much what happened in *Regal*.

A further justification for control of insider trading is stated to be that, the maintenance of investors' confidence in securities of a company may be threatened by a knowledge that those securities are prone to internally generated artificial pricing and undercutting.²⁹ This is, indeed, the efficiency argument which looks at the effect on the market of the nondisclosure and self dealing by the insider.

Farrar,³⁰ submits that the aim of any stock market is to rapidly assimilate all available information about the company and almost immediately reflect that information in the share price. Investors should be able to identify those companies where their capital is most needed and will most profitably be used. This enables resources to be efficiently allocated and not 'wasted' in companies which are going into decline. He submits further, that, an efficient stock market is a necessary corollary of an efficient capital allocation. Therefore, if there is information of a price sensitive nature available, which is not disclosed and on the basis of which some people are trading, then they are distorting the market and the price at which shares are being

28a (1942 ALL ER 278.

28b (1967) 2 AC 46.

29 Olawoyin, G.A., op. cit. p.147.

30 Farrar, J.H. et al., op. cit. Pp.365-366.

sold is an artificial one. When this fact, subsequently becomes apparent, public confidence in the stock market is diminished. As investors are generally risk averse, they may withdraw from the stock market which is becoming more of a gamble.

The other argument of equity is also related to the available market. American commentators call it the concept of market egalitarianism.³¹ It is simply the belief, that the law should endeavour to ensure that all individuals in the market, are placed on an equal footing as far as it is possible. This requires, first, timely and adequate disclosure by companies of price sensitive information and secondly, the prohibition of dealing on any such information which is undisclosed. This is also designed to maintain investor confidence in the integrity of the capital market.³²

Another view often stated is simply that the practice is contrary to good business ethics and morally wrong.³³

Insider trading has also attracted calls for its criminalisation, because it is akin to the offence of cheating, or obtaining by false pretences, whereby a person fully aware of the true state of events in a corporation, in the context of price sensitive information ought to disclose to all interested in that corporation but fails to do so. If he proceeds to take advantage of it to the detriment of other interested persons, such other persons stand cheated since if they also knew of the information, they might have taken advantage of it.³⁴

31 Farrar, J.H. et al., op. cit. p.366.

32 Ibid.

33 Justice Insider Trading (1972) para 3; Farrar J.H. et al., Ibid; Agom, A.R. op cit p.152.

34 Akume, A.A. "A Case for Corporate Liability for Insider Trading Offences in Nigeria" in Ahmadu Bello University Law Journal (ABULJ) Vols 23-24, 2005-2006 p.151.

However, the debate has not been totally one-sided as not everyone is convinced that insider dealing should be prohibited. Some economists and legal scholars like Henry G. Manne, Milton Friedman, Thomas Sowell, Fanel Fischel and Frank H. Easterbrook, are opponents of control of insider trading. They argue for revocation of laws prohibiting the practice, their contention being that insider trading based on material non-public information benefits investors, in general, by more quickly introducing new information into the market.³⁵

Supporters of the debate argue that, most outsiders who bought from or sold to insiders would have traded anyway and possibly at a worse price. For example, if the insider sells stock because he expects the price to fall, the very act of selling may bring the price down to the buyer. In such a case, the buyer who would have bought anyway actually gains. The outsiders who lose in such a situation are buyers on the margin, who would not have bought unless the insider had sold and brought the price down slightly, and sellers who sold for less or could not sell at all. They argue that such systematic diversion of wealth from outsiders to insiders may decrease the share price and raise the corporate cost of capital.³⁶

The most controversial issue in the economic analysis of insider trading is that it is an efficient way to pay managers for their entrepreneurial services to the corporation. That it gives managers a monetary incentive to innovate, search for and produce valuable information, as well as to take risks that increase the firm's value and is "cheap" for long-term shareholders because it does not come from corporate profits.³⁷

35 Insider Trading, Wikipedia.<http://Wikipedia.org/wiki/insidertrading> (retrieved on 23rd December, 2010).

36 Dolgoplov, S., *Insider Trading: The Concise Encyclopaedia of Economics*. Retrieved from <http://www.econlib.org/> on 31st December, 2010.

37 Ibid.

Manne,³⁸ has argued that far from prohibiting it, there should be an unfettered right to trade on the basis of inside information. To him, insider trading is in fact the only form of compensation which can adequately compensate managers for their entrepreneurial skills. Moreover, it in fact benefits the market since allowing insiders to trade before the information is disclosed will actually accelerate the incorporation of information in the market price. In any event, there is no evidence that the practice harms anyone since the decision of the outsider to purchase or sell shares is independent of, and not induced by, the conduct of the insider.

It is submitted that insider trading has some downside incentives and is likely to reward mere access to information rather than its production. Therefore, allowing insider trading would encourage managers to disclose information prematurely or delay disclosure in order to arrange stock trades, to delay transmitting information to corporate decision makers, to pursue excessively risky projects that increase trading profits but reduce corporate value, to increase tolerance for bad corporate performance by allowing insiders to profit on negative developments and to determine their compensation unilaterally.

Whoever says the practice is a victimless act is wrong because it affects the securities market, the company and ultimately, the economy.

The iniquitous decision in *Percival v. Wright*,³⁹ emboldened insider dealers by denying individual shareholders any relief against directors who may have breached their fiduciary duties by exploiting insider information to their benefit. The directors

38 Manne, H.G. *Insider Trading and the Stock Exchange* (New York, 1966).

39 (1902) 2 Ch.421.

had purchased shares from members of their company who afterwards discovered that the directors had known at the time of the sale, but failed to reveal to the members that negotiations were on foot for the purchase of the undertaking of the company by a third party at a more favourable price. Upon discovery the members sought to resile from the transaction. It was held that the members could not impeach the contract since the directors' fiduciary duty of disclosure was owed to the company itself, not individual shareholders.

The case established the special circumstance doctrine of fiduciary relationship as a condition precedent for a successful action. The pertinent question is why would the court impose a higher responsibility on directors in their dealings with the corporate alter ego and demand less from them when they deal with the real persons behind that corporate entity?

Yagba,⁴⁰ submits that this decision made in the era of laissez-faire liberalism implied that a director is not bound to account either to the company or shareholders for profits made by speculating in the shares of his own company by making use of confidential information unknown to other shareholders. This endorsement of insider trading is intolerably repugnant to notions of commercial morality and market egalitarianism.

Percival v. Wright (Supra), has since been arrested. In the more recent New Zealand case of *Coleman v. Myers*,⁴¹ the plaintiffs who had sold their shares to the managing director of the company at gross undervaluation successfully maintained a claim against him for nondisclosure. The court admitted that *Percival* was directly opposed to prevailing notion of correct

40 Yagba, T.A.T. et al, *Elements of Commercial Law* (Zaria: Tamaza Publishing Company Ltd, 1994) p. 366.

41 (1977) 2 NZLR 225.

commercial practices and should not be followed in impeached transactions which dealt with identified shareholders. The court was particularly influenced by its decision, by practical considerations of the responsibilities which the directors owe to shareholders.

In Nigeria, there is no reported court case on the relaxation of the decision in *Percival v. Wright (Supra)*. However, the Companies and Allied Matters Act, 2004, has attempted in Section 279(2) to entrench exceptions to the decision where a director is acting as an agent of a particular shareholder or is dealing with the company's securities, for example, in the course of a takeover.

Regulations of Insider Dealing: Conceptual Basis

Once shares become easily bought and sold on a stock exchange the potential for those inside or connected to the company to abuse their knowledge of the company's future plans or announcements arises⁴². Against this backdrop, every country in the world with a major stock exchange, has made this practice illegal because of its potential to destroy confidence in the stock exchange. In spite of the fact that there are views that insider dealing should not be outlawed, the view that the behaviour is morally reprehensible prevails and the law attempts to deal with this through criminal and civil sanctions⁴³.

The argument in favour of regulation of insider dealing is not simply a negative one that the undeserving should be deprived of gains or losses avoided. There is positive argument in favour of regulation, which is the promotion of confidence in

42 Dignam, A. et al. *Company Law*, 4th edition (New York: Oxford University Press, 2006) p.74.

43 Ibid.

the securities market⁴⁴ and it has long been confirmed in *Diamond v. Oreamuno*,⁴⁵ that insider trading could tarnish a corporation's reputation and jeopardise public acceptance and marketability of its securities. In that case, directors sold large number of shares in their company in the knowledge that the profits of the firm had slumped drastically. When the results were finally released and the price of the shares fell from that which the directors had sold their holdings to a lower price, the purchasers of the shares instituted a derivative action against the directors in the name of the company to compel them to account for their profits. They lost at first instance but on appeal, it was held that corporate officers and directors who trade in undisclosed inside information violate their fiduciary duty to the corporation and may be held accountable to the corporation for their gains.

In *Strong v. Repide*,⁴⁶ the Supreme Court of the United States of America held that, a director upon whose action the value of the shares depends, cannot avail of his knowledge of what his own action will be to acquire shares from those whom he intentionally keeps in ignorance of his expected action and the resulting value of the shares.

Debates on the merits and demerits of the practice have been conducted mainly in the United States of America and it was the first country to tackle insider trading effectively.⁴⁷ In the United States and Germany, corporate insiders are defined as

44 The Preamble to EEC Directive 89/592 Coordinating Regulations on Insider Dealing (1989) O.J.L. 334/30.

45 (1969) 24 N.Y. 2d 494.

46 Unreported. Culled from Insider Trading. Wikipedia encyclopaedia http://wikipedia.org/wiki/Insider_Trading (Retrieved on 23rd December, 2010).

47 Loss and Seligman: Fundamental of Securities Regulation, 3rd edition, (Boston Mass., 1995) pp.759-875.

company's officers, directors and any beneficial owner of more than 10 percent of a class of the company's equity shares.⁴⁸ Trades made by those types of insiders in the company's stock, based on material non-public information, are considered to be fraudulent since the insiders are violating the fiduciary duty that they owe to shareholders.

The corporate insiders, simply by accepting employment or public position, have undertaken a legal obligation to the company to put her interests before their own in matter related to the company. It is generally accepted that the directors owe the company a fiduciary duty to act in her best interest at all times and not to unduly benefit from his function.

The United Kingdom agonized over the practice for several decades and legislated against it only in 1980. In 1985, it passed the Companies Securities Act to deal with insider trading. In 1989, the European Economic Community adopted a Directive on the practice and the British legislation was revised giving rise to the enactment of the Criminal Justice Act, 1993, which is complimentary to the Companies Securities Act, and the British Stock Exchange model code for Securities Transaction found in the listing rules.⁴⁹ In addition, the London Stock Exchange (LSE) also tries to ensure that opportunities for insider dealing are minimised by ensuring that companies disclose any significant information that affect share price as quickly as possible.⁵⁰

48 Insider Trading. Wikipedia. [Http://Wikipedia.org/wiki/insider_trading](http://Wikipedia.org/wiki/insider_trading) (Retrieved 23rd December, 2010).

49 Davies, P.L. op. cit. pp.1090-1091.

50 Dignam, A. et al., op. cit. p.74.

In the United Kingdom, there are therefore, both criminal and civil sanctions regimes for the practice. Section 397 of the Financial Services and Markets Act (FSMA) 2000 (formerly section 47 of the Financial Services Act, 1986), contains a general catch-all criminal provision on false and misleading information which would cover insider dealing. However, Part V of the Criminal Justice Act, 1993 contains the main criminal provisions specifically on insider dealing.⁵¹

The criminal insider dealing provisions have not been of great success because of the difficulty in reaching the criminal standard of proof.⁵² As a result, the Government introduced a civil offence of 'market abuse' contained in section 18 of the Financial Services and Market Act (FSMA) 2000.

Under FSMA 2000, there are six forms of market manipulation as market abuse, all of which have the capacity to distort the market price of relevant securities. Civil penalties are imposed on liability of market abuse. In addition, restitution can be ordered by the court on the application of Financial Services Authority (FSA) or the Secretary of State under Section 382 FSMA, 2000 or directly by the FSA under Section 384 FSMA 2000.⁵³ Others are public censure, injunctions and variation or cancellation of an investment authorisation.⁵⁴

The old Nigerian Companies Act,⁵⁵ made no mention of insider dealing. However, the law reform which orchestrated the enactment of the Companies and Allied Matters Act,⁵⁶ addressed the issue and made it part of Nigerian law. Subsequently,

51 Section 52(1) Criminal Justice Act, 1993.

52 Dignam, A. et al. op. cit. P.75.

53 Sealy, L. et al., op. cit. P.587.

54 Dignam, A. et al., op. cit. p.76.

55 Companies Act, No. 51, 1968.

56 Cap. 59, Laws of Federation of Nigeria, 1990.

the provisions of the Act dealing with insider dealing were repealed by the Investment and Securities Act,⁵⁷ which dealt with the matter. The Investment and Securities Act, 1999 has been repealed and the current legislation on the issue is the Investment and Securities Act, No. 29, 2007.

The eugenic provisions of the Act,⁵⁸ have incorporated the principle in *Diamond v. Oreamuno* and are couched belligerently to deal with the corporate menace of insider dealing (manifested in illegitimate informational advantage) with a view to instilling some level of corporate discipline and enhancing market egalitarianism.

In addition to ISA, 2007, insider trading, or similar practices, are also regulated by the Securities and Exchange Commission under its Rules.⁵⁹ These rules are designed to protect investors and maintain confidence in the securities market.

The Nigerian Capital Market is regulated by the Securities and Exchange Commission. The Commission's key responsibilities are spelt out in the Act establishing it.⁶⁰ It basically amongst other functions, regulates investments and securities business in Nigeria, maintains surveillance over the securities market to ensure orderly, fair and equitable dealings in shares, protecting the integrity of the market against abuses arising from unwholesome practices such as insider trading, and it also regulates listed companies to ensure compliance with listing rules. It gives the assurance to stakeholders that investment thrives on the strength of good and fair information and sound practices.

57 No. 45, 1999.

58 ISA No. 29, 2007, Sections 111 and 112.

59 Rules 110 – 112 Securities and Exchange Commission Rules and Regulations, 2006

60 ISA, 2007, Section 13.

When shareholders lose confidence in a company and hurriedly sell off their shares, thus, precipitating a sharp decline in its price, the rippling effect is far-reaching as it is reflected in the investors' confidence and the economy as a whole.

The case of having public regulation of insider trading must, therefore, rest on such factors as inefficiency of private enforcement or insider trading's overall adverse impact on shares.

Prohibited Acts and their Scope

Direct Insider Dealing

Subject to the exceptions set out in Section 104 of the Act, Section 111 prohibits an insider with inside information from buying or selling or otherwise dealing in securities of the company which are offered to the public for sale or subscription if, by virtue of his connection with the company, he has information which he knows to be unpublished price sensitive in relation to those securities so long as it would be reasonable to expect a person so connected not to disclose such information except for the proper performance of the functions attaching to that office.

Similarly, an insider of a company is prohibited from dealing in securities of any other company, which are issued to the public for sale or subscription, if by virtue of his connection with the first company, he has information relating to any transaction, actual or contemplated, involving both the first company or involving one of them and securities of the other to the fact any such transaction is no longer contemplated which he knows to be unpublished price sensitive information in relation to the securities of that other company so long as it

is reasonable to expect a person so connected and in the position by virtue of which he is so connected not to disclose except for the performance of the function of that person.

Since private companies are generally prohibited from inviting the public to subscribe for their shares or debentures,⁶¹ the above provisions apply to public companies only and in situations where the securities are issued to the public for sale or subscription and do not cover private or non market offers by such public companies. It is submitted that this restricted prohibition is not suitable for Nigeria because not all public companies are quoted on the securities market and most companies cannot satisfy the listing requirements and would not want to be quoted.

The whole concept of insider dealing or trading revolves on confidential information. The Act,⁶² defines it as information which:

- (i) relates to specific matters relating or concerning (directly or indirectly) to that company, that is, the general nature relating or concern to that company.
- (ii) it is generally known to those persons who are accustomed to or would be likely to deal in those securities but which would, if it were generally known to them be likely materially to affect the price of the securities.

The information is therefore, one which is likely to stimulate the price of a company's securities, materially, in a particular

61 Companies and Allied Matters Act, Cap. C20 Laws of the Federation of Nigeria 2004 Section 22(5); Investment and Securities Act No. 29, 2007 Sections 67(1) and 69(1); *Blue-chip Acquisition and Investment Company Ltd v. Zenith Bank Plc & others* (2005), 3 ISLR 72 at 90.

62 ISA, 2007, Section 315.

direction. Such unpublished price sensitive information may subsequently be desensitized by its publication or declassified if it becomes generally known to the concerned public – persons accustomed or who would likely deal in the affected securities.⁶³

The information is therefore available either when it has been announced or otherwise publicised and the market has had sufficient time to reflect on the company's share price or where it consists of facts or material that are readily observable in a public arena; or of deductions, conclusions or inferences made or drawn from information which is readily observable or has been sufficiently publicised.⁶⁴

Insider Dealing in a Takeover Bid

Apart from insiders and their tippees, Section 111(4) and (5) of the Act, make provisions for persons who, though not insiders, as such, are privileged by their special relationship with the company to be in possession of relevant information.

Under subsections (4) and (5), where a person is contemplating or has contemplated to make a takeover offer for a company in a particular capacity, that person cannot deal in securities of that company in another capacity if he knows that information that the offer is contemplated, or is no longer contemplated, and the offer is unpublished price sensitive information in relation to the securities. Similarly, a tippee who has knowingly obtained unpublished price sensitive information from such

63 Asein, J.O., op. cit., P.65.

64 Maslen-Stannage, R. and Sheehy, P. Avoiding Insider Trading: A Director(s) Guide (Cover Story by Humphry, R.), <http://www.companydirectors.com.all/publications/company+Director+Magazines/avoiding+insider+trading> (Retrieved on 23rd December, 2010).

an individual is himself prohibited from dealing in those securities.

Tipping is therefore, another form of insider dealing and occurs where a person connected to the company either directly or indirectly receives such information from an insider (the tipper). This duty is imputed when a corporate insider tips a friend about non-public information likely to have an effect on the company's share price. The duty the corporate insider, for example, a director owes the company is then imputed to the friend and the friend violates a duty to the company if he trades on the basis of such information as long as the person receiving the information knew or should have known that the information was company property. The requirement of knowledge on the part of this category of insiders entails having the requisite mens rea which makes proof of the act difficult.

In **Dirks v. Securities and Exchange Commission (SEC)**,⁶⁵ the Supreme Court of the United States held that tippees are liable if they had reason to believe that the tipper had breached a fiduciary duty in disclosing confidential information and the tipper received any personal benefit from the disclosure.

Persons Prohibited from Dealing on The Stock Exchange

Any individual who is prohibited from dealing on an approved Securities Exchange or Capital Trade point in any securities by the provisions of the Act,⁶⁶ must not counsel, procure any other person to deal in those securities if he knows or has reasonable cause to believe that the person would deal in them. These are insiders, tippees and bidders.

65 Unreported. Culled from Insider Trading Wikipedia. [Http://Wikipedia.org/wiki/insider_trading](http://Wikipedia.org/wiki/insider_trading) (Retrieved 23rd December, 2010).

66 ISA, 2007, Section 111(6).

Abuse of Information Obtained in Official Capacity

The Act,⁶⁷ also prohibits insider trading or dealing in respect of information held by a public officer or former public officer by virtue of his position or former position as public officer or a tippee of such public officer or former officer if the tippee knows or has reasonable cause to believe that the public officer or former public officer held the position. The information must be such that it would be reasonable to expect a person in the position of the public officer not to disclose except for the proper performance of the functions attaching to that position and the person holding it knows that it is price sensitive information in relation to relevant securities, that is, securities of a particular company.⁶⁸

The public officer or his tippee is prohibited from dealing in securities; counselling or procuring another person to deal in securities if he knows or has reasonable cause to believe that he or some other person will make use of the information for the purpose of dealing, or counselling or procuring any other person to deal, on a recognised Stock Exchange in any such securities.⁶⁹

Acts Not Prohibited

Not all trading by insiders are prohibited. Certain transactions are exempted from the provisions of Sections 111 and 112 of the Act.

Under Section 113 of the Act, the following transactions by a person are exempted:

⁶⁷ Ibid, Section 112(1).

⁶⁸ Ibid, Section 112(2).

⁶⁹ Ibid, Section 112(3).

- (a) Doing a particular thing otherwise than with a view to making of profit or the avoidance of a loss by use of that information;
- (b) Entering into a transaction in the course of the exercise in good faith of his functions as a liquidator, receiver or trustee in bankruptcy;
- (c) Doing any particular thing if the information:
 - (i) Was obtained by him in the course of a business of stock brokers in which he was engaged or employed.
 - (ii) Was of a description which it would be reasonable to expect him to obtain in the ordinary course of that business, and he does that thing in good faith in the course of that business.

Finally, unlike the old law,⁷⁰ the current law⁷¹ has not granted special exemptions to trustees and personal representatives. It is submitted that this position is better. Under the old regime, where a trustee or personal representative would have been liable for insider trading, he may be presumed to have acted with propriety, that is, otherwise than with a view to making profit or avoidance of loss by use of the information, provided he acted on the advice of a person who appears to him to be an appropriate person from whom to seek such service, for example, a legal practitioner or an accountant, and it did not appear to him that he was prohibited from dealing in those securities. The exemption was capable of lending itself to abuses as many unscrupulous persons would always find some compelling circumstances of propriety of their actions. The law should not allow a forced sale where a person has unpublished

⁷⁰ ISA, No. 45, 1999, Section 91.

⁷¹ ISA, No. 29, 2007.

price sensitive information in the name of propriety and equity. The amendment in the current law which has dropped that exception is therefore commendable.

Consequences of Breach

The economic justification for outlawing insider dealing or trading is its adverse effects on the securities markets and the corporation's reputation and economic base. Therefore, breach of the prohibiting provisions must be attended by dire consequences otherwise the provisions will be mere rhetorical gestures.

Any transaction done in contravention of sections 111 and 112 of the ISA is avoidable at the instance of the Commission.⁷² This is quite different from the position under the old law⁷³ which did not void or make the contravening act voidable but placed liability only on the insider perpetrator. The current position is commendable because it will enable the Commission to cancel the transaction itself and seek restitution and return to status quo.

An insider who contravenes the prohibiting sections is subject to both criminal and civil liability.

Criminal Liability Regime

Under the criminal liability regime, any person who contravenes any of the provisions commits an offence and is liable on conviction:

⁷² ISA, 2007, Section 114.

⁷³ ISA, 1999, Section 92.

- (a) if he is not a body corporate, to:
 - (i) a fine of not less than N500,000 or an amount equivalent to double the amount of profit derived by him or loss averted by the use of any of the information obtained; or
- (b) in the case of a body corporate, to a fine of not less than N1,000,000 or an amount equivalent to twice the amount of profit derived by it or loss averted by the use of such information obtained.

While section 115(b) of the Act has stipulated a fine of N1,000,00 or an amount equivalent to twice the amount of profit derived or loss averted by the use of the information obtained in contravention of Sections 111 and 112 of the Act by a body corporate, the definition of insider given under Section 315 of the same Act relates exclusively to individuals and does not cover companies. Section 115(b) is therefore a provision in vacuole.

In other jurisdictions, there is also the “misappropriation theory” which is applied to attach criminal liability to an insider. The theory is simply that anyone who misappropriates (steals) information from their employer and trades on that information in any stock (not just the employer’s stock) is guilty of insider trading.⁷⁴

The United States Supreme Court applied the misappropriation theory of insider trading in *United States v. O’Hagan*.⁷⁵ In that case, O’Hagan was a partner in a law firm representing Grand Metropolitan. While it was considering a tender offer

74 Insider Trading. Wikipedia. [http://Wikipedia.org/wiki/insider trading](http://Wikipedia.org/wiki/insider%20trading) (Retrieved 23rd December, 2010).

75 (1997) 521 U.S. 642, 655.

for Pillsbury Company, O'Hagan used this inside information by buying all options on Pillsbury stock, resulting in profits over \$4 million. O'Hagan claimed that neither he nor his firm owed a fiduciary duty to Pillsbury, so that he did not commit fraud by purchasing Pillsbury options. He was found guilty. On appeal, the court rejected O'Hagan's argument and upheld his conviction.

Civil Sanctions Regime

Under civil liability, a person liable for contravening the prohibition provisions is liable to pay compensation to any aggrieved person for loss suffered by that person as a result of the transaction.⁷⁶ The payment of compensation is at the order of SEC or the Investments and Securities Tribunal and the amount of compensation also is to be determined by the Commission or the Tribunal.⁷⁷

One wonders why the Act has not made the culprit accountable to the company affected because the conduct has the effect of tarnishing its reputation and adversely affecting its share price and economic base.

The position would have been in tandem with the decision in *Diamond v. Oreamuno (supra)*. In *Regal (Hastings) Ltd v. Gulliver (Supra)*, the insider directors were made to account to their company for the profits they got through knowledge and opportunity they gained as directors and obtained shares. Other cases like *Industrial Development Consultants Ltd v. Cooley*⁷⁸ and *Canada Aero Service v. Omalley*⁷⁹ also attest to this.

⁷⁶ ISA, 2007, Section 116(1).

⁷⁷ Ibid, Section 116(2).

⁷⁸ (1942) ALL ER 278.

⁷⁹ (1973) 40 Dominion L.R. 371.

The courts have also drawn certain distinctions to the rule in *Percival v. Wright (supra)* in cases where the director was acting as an agent of a particular shareholder or in transactions involving the company's securities such as in the course of a takeover. These cases are – *Allen v. Hyatt*,⁸⁰ *Briess v. Wooley*⁸¹ and *Gething v. Kilner*.⁸² In the last case, it was held that in a takeover bid, the directors of the victim company owe a duty to their shareholders to be honest and not to mislead them as by suppressing for instance, professional advice recommending rejection and that the court might grant an injunction where this had happened to prevent the bid going ahead.

In the other cases, directors had negotiated the sale of shares for the shareholders. It was held that the directors were in such circumstances agents of the shareholders who would be liable where the directors would be liable. These exceptions to *Percival vs. Wright (supra)* have been codified in section 279(2) Companies and Allied Matters Act⁸³ which foists a fiduciary relationship on directors whenever they are acting as agents of a particular shareholder or concerned in a transaction involving dealings in the company's securities.

It is submitted that the sanctions for contravention of provisions prohibiting insider dealing or trading in Nigeria and their enforcement are not as elaborate as in other jurisdictions like the United Kingdom. Under the criminal liability regime, penalties exist in form of fines. The civil sanction is simply compensation to only an aggrieved person who has suffered

80 (1914) 30 TLR 444.

81 (1954) AC 33 HL.

82 (1972) 1 ALL ER 1166 at 1170.

83 Cap C.20 Laws of the Federation of Nigeria, 2004.

loss. The issue of 'market abuse' is not part of our law and remedies like restitution, injunction, cancellation of transaction and disqualification of insiders are not available. In UK, in addition to the traditional criminal penalties which may be visited upon insiders, the disqualification sanction is available against some insiders in some cases, the effect of which is to disable the person disqualified from being involved in the running of companies in future.⁸⁴ Thus, in *R v. Goodman*,⁸⁵ the Court of Appeal upheld the Crown Court's decision to disqualify, for a period of 10 years, a managing director convicted of insider dealing. The Crown Court had invoked section 2 of the Company Directors Disqualification Act 1986 which enables a court to disqualify a person who has been convicted of an indictable offence with the management of a company.

The ISA regulating dealing in securities in Nigeria does not have such provisions. There is disqualification of directors in connection with management of companies generally under Section 254 of the Companies and Allied Matters Act.⁸⁶

There is need for our law to broaden the sanctions that attend the monstrous and sore practice of insider dealing or trading in order to tackle it and pave way for morally accepted commercial practices and respectability of the securities market.

Finally, the key problem that our law has not addressed is insider dealing in a global perspective. The issue of multinational or transnational corporations in Nigeria has not been considered by the Act but mention is merely made of associated or

⁸⁴ Davies, P.L., *op. cit.* p.239-255, 1127.

⁸⁵ (1993) 2 ALL ER 789 C.A.

⁸⁶ Cap C.20, LFN, 2004.

related company.⁸⁷ The pertinent question is what happens when the related company is a foreign multinational? Other jurisdictions have come to grips with the concept of group companies in securities transactions and have come up with Community Laws or Directives to tackle the practice.

It is suggested that Nigerian government should brace up to obtain information about international aspects of insider trading and other financial market wrongs, not only by imposition of sanctions under domestic legislation, but also through co-operation with regulatory authorities in countries involved. Memoranda of understanding between Nigeria and other countries subsequently made part of our companies' securities legislation will internationalise the capital market and insider dealing will be tackled to greater dimensions. This is more so that economic integration has superseded economic colonialism.

The approach of the United Kingdom in fighting insider trading, that is adoption of both Civil Codes and the Criminal Justice Act, 1993 is more fortifying and thus, recommended for Nigeria.

Conclusion

Insider dealing is a practice that is anchored on greed and the penchant for private gain of a person in a privileged position with privileged information at the expense of persons who do not have similar advantage. No doubt, it has catastrophic effects on the victims of its practice. To the individual investors, it causes financial loss and damage. To the company, it tarnishes its reputation and adversely affects its share price

87 ISA, 2007, Section 315.

and economic base. It erodes public confidence in the securities market and creates the problem of diversion of investments from the markets and has a spill-over effect on the entire economy.

The menace is such that its control cannot be left to the shareholders or private persons. Government intervention in form of regulation by prescriptive provisions by way of prohibitions is necessary. However, it requires a lot of political will and zeal on the part of government to tackle the practice. This article has critically examined attempts by the Nigerian government through the instrumentality of legislation to tackle the problem. There is however, still much to be done. The suggestions made are by no means encyclopaedic and exhaustive but if taken, will boost the fight against insider dealing/trading.

Chapter Nine



United Nations Convention on the Laws of the Sea as Tool for the Resolution of Climate Change Disputes

M.M. Dura*

Introduction

Climate change today is an issue of great international concern because of its links to security of man on planet earth. The effects of climate change including sea level rise, desertification, glacial melting and water star gates, all contribute to increased competition for natural resources.¹ The correlation between climate change and security threats has led policy makers to view climate change as a security issue, due to its wide spread social, economic, geopolitical and environmental dimensions.²

Water, forming three-quarters of our planet cannot but be central issues relating to climate change. The Arctic region for instance has been experiencing depletion in this ice level due

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1 Climate change security at [http://climatelab.org/climate change security](http://climatelab.org/climate%20change%20security), last visited on 30/01/2011.

2 Ibid.

to climate change³ and there may be more of this depletion if its oil deposit begins to be explored by the three surrounding coastal countries of Russia, USA and Canada. There is even fear of this three countries clashing in the exploitation of oil deposits in the Arctic.⁴ The resolution of this kind of clashes is within the purview of the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS, the most comprehensive regime on the rights and liabilities of nations on the uses of the high seas, is therefore a very important tool in the settlement of climate change disputes.

This work examines the impact of the seas on climate change, the relationship between climate change and world security, the sufficiency or otherwise of UNCLOS in the resolution of climate change disputes and makes some recommendations.

An Overview of the United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS sets up a legal regime for the seas and oceans and this represents the attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean. In terms of environment, UNCLOS establishes material rules concerning environmental standards and enforcement provisions regarding pollution of the marine environment, UNCLOS was adopted in 1982 in Montego Bay, Jamaica and entered into force 1994. It certainly has 158 parties.

The major features of the convention include navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the sea bed beyond the limits of the national

3 Thilo Neuman "Climate Change, Conflicts and Cooperation in the Arctic" at www.iflos.org last assessed on 15/01/2011, 5pm.

4 Ibid.

jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment, a marine research regime and a building procedure for settlement of disputes between states.⁵

In order to administer UNCLOS, the treaty created four bodies to handle specific issues. The commission on the Limit of the Continental Shelf was created to implement Article 76 of the treaty, which allows nations to extend sovereignty over a portion of the continental shelf beyond the limits of the Exclusive Economic Zone.

Also created was the International Sea Bed Authority⁶, simply called the "Authority". It is responsible for the governance of the Area – the portion of the sea bed that is beyond the Exclusive Economic Zone or the recognized continental shelf of a country. It comprises the Assembly, the Council and the Secretariat.

The third body created by UNCLOS is the Enterprise which is responsible for the coordination, exploration and exploitation of resources in the Area. Finally, International Tribunal for the Law of the Sea (ITLOS) is established in Annex VI of UNCLOS. The Tribunal has formed a number of chambers including the Chamber of Summary Procedure, the Chamber of Fisheries Disputes, the Chamber of Marine Environmental Disputes and the Chamber for Maritime Delimitation Disputes.⁷ The Tribunal is also the home of the Sea Bed Disputes Chamber, which is responsible for adjudicating disputes pursuant to part XI, section 5 of UNCLOS, which

5 "The United Nations Convention on the Law of the Sea (UNCLOS)" available at <http://www.tematea.org?node2>.

6 Created pursuant to Article 156, UNCLOS.

7 International Tribunal for the Law of the Sea, General information available at <http://www.itlos.org/start2en.html> accessed 3/2/2011, 3pm.

governs settlements of disputes that arise from deep seabed activities.⁸

Climate Change Disputes

Climate change has been defined as long-term alteration in global weather patterns, especially increases in temperature and storm activity, regarded as a potential consequence of green house effect".⁹

Climate change represents the latest series of environmental drivers of human conflict that have been identified in recent decades, following others including drought, desertification, land degradation failing water supplies, deforestation, fisheries depletion and even ozone depletion.¹⁰

The scientific link between climate change and marine environmental protection has been identified and has been highlighted in part through the work of the Intergovernmental Panel on Climate Change (IPCC)¹¹.

The following is an overview of the conclusions reached by the IPCC in its Third Assessment Report of 2001 with respect to climate change impacts on the marine environment:

Ocean-related impacts of human induced climate change identified by the IPCC include the following:¹²

8 UNCLOS Annex VI article 5.

9 Encarta Dictionary, Microsoft Encarta DVD, 2009.

10 T.Homer – Dixon "On the Threshold: Environmental Changes as Causes of Acute Conflict" *International Security*, 16.2, 1991 pp,76-116, cited I Brown, O et al "Climate change as the 'new' security threat: implication for Africa" at <http://www.iisd.org/pdf/2007/climate....eat Africa pdf>, last visited on 3/2/2011.

12 Ibid.

- Global average sea level rises of 0.09 – 0.88 meters by 2100;
- Reductions in sea-ice cover;
- Increased storm floods worldwide;
- Accelerated levels of coastal erosion;
- Increased seawater intrusions into fresh surface and groundwater;
- Accelerating adverse impacts on marine fish; and
- Impacts on aquaculture.

The summary of this report is that climate change has continued to destabilise the marine ecosystem with grave physical, economic and political consequences, namely, flooding, drought, depletion of fish stock, water shortage, hunger, poverty and consequently, communal clashes. The impacts of climate change are so pervasive that one commentator referred to climate change as the “mother of all security problems”.¹³

In 2004, the British government's chief scientist, Sir, David King suggested that “Climate changes is for greater threat to the world's stability than international terrorism.”¹⁴ African leaders have equally expressed concern about climate change. At an African summit in early 2007, Yoweri Museveni, the president of Uganda called climate change “an act of aggression by the developed world against the developing world” and demanded compensation for the damage global warming would cause African nation.¹⁵ A couple of months later, Kaire Mbuende, the Namibian representative to the United Nations called the

13 Schwartz, P and Randall, D *An Abrupt Climate Change Scenario and its implication for United States National Security* (New York: Environmental Defense, 2003).

14 BBC News “Global warming biggest threat” 9/1/2004 at , 5pm.

15 Clark, A. “Climate Change Threatens Security, UK Tells UN” *Guardian*, 18 April 2007.

developed countries emission of green houses tantamount to "low intensity biological or chemical warfare."¹⁶ Agreeably, African is suggested to be most prone to the impact of climate change due to her weak adaptive capacity owing to the weak state of her technology.

To fully appreciate the conflict that rides on the wings of climate change, some causes of these conflicts will be discussed here.

Population Displacement

Population displacement as related to climate change is the migration of people from one place to another either in search of food and water supply due to desertification and water shortages or due to flooding or destructive wind. The Darfur refugee camp in Chad is a good example as the Darfur crisis has its foundation in food shortages due to climate change.¹⁷ Also, more than 25 percent of the African population lives within 100 kilometres of the coast and 10 major cities are port cities located on the coast¹⁸. This population could be at risk with high rise in sea levels.

Border/Territory Disputes

Melting to polar ice is likely to create new land masses with the resultant scrambling for those lands by adjoining states. The territories to be most likely disputed in future are the Arctic and Antarctic regions. The Arctic for instance is said to be fast

16 United Nations security council department of public information "United Nations security council change on peace, security hearing over 50 speakers", UN security council 566 3rd meeting 17 April 2007 <http://www.org/News/press/docs/2007/sc9000.doc.htm>. accessed on 15/01/2011, 3pm.

17 Brown, O. Et al Op. Cit pg 1143, 114.

18 "Climate Change Security" <http://www.cna.org/nationalsecurity/...e%20 change.pdf>.

losing its ice to global warming¹⁹. Also, following a scientific finding that about 13% of the world's petroleum deposit is in the arctic regions, USA, Canada and Russia all have laid claims to territory in the region²⁰ and Arctic boundary disputes between Canada and Russia over the Lomonosov Ridge have already taken place.²¹ The Antarctic region is currently divided between seven different countries and includes several portions of unclaimed territory.

In the region, Argentina and Chile have had some minor disputes over the melting Southern Patagonia ice field, which after fully melting, could emerge as a valuable oil resources and tourist destination in the region.²²

Resources Disputes

In June, 2007, a report by the United Nations Environmental Programme (UNEP) suggested that the conflict in Darfur has in part been driven by climate change and environmental degradation.²³ Over the past forty (4) years, rainfall in the region has fallen by 30% and Sahara has advanced by more than a mile every year. The resulting tensions between farmers and herders over disappearing pasture and declining water-holes underpins the genesis of the Darfur conflict.²⁴ Some analysts have even attributed the buildup to the 1994 Rwanda genocide to high levels of population growth and scarcity of

19 Thilo Neuman Op. Cit p.3.

20 Ibid.

21 <http://www.canada.com/topics/news/naa...b2df8b&k=88331>.

22 Climate Institute-Climate change security at <http://www.clarin.com/diario/2006/08...m-01262333.htm> last visited on 15/01/2011, 5pm.

23 United Nations Environmental Programme, "Sudan; Post-Conflict Environmental Assessment" (Nairobi UNEP, 2007). Cited in Brown, O. et al. Op. Cit. P.143.

24 Brown, O. et al Op. Cit P.143.

resources.²⁵ It is also predicted that water shortage due to Himalayan glacier melting could be a potential causes of conflict between India and Pakistan.²⁶

International Regimes on Climate Change

The Kyoto Protocol is the most authoritative regime on climate change. Adopted in 1997, it sets concrete targets for developed countries to reduce greenhouse gas emission that contribute to global warming, also known as climate change. The Kyoto Protocol is a supplementary treaty to the United Nations Framework Convention on Climate Change (UNFCCC) and went into force in 2003. More than 130 countries are party to it.²⁷ The protocol provided an arrangement for developed countries to reduce emission of six main greenhouse gases: Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. Developed nations are required to achieve a reduction of 5% of their 1990 protocol essentially provides three mechanisms to reduce emissions. The first is the simple expedient of avoiding carbon emissions through becoming more energy. The second is trading schemes whereby permits to emit can be traded between one nation that is emitting less greenhouse gases than it is allowed and another that is exceeding its allowance. The potential to make financial gains through selling emission permits could act as an incentive to invest in emissions. The

25 Uvin, P "Tragedy in Rwanda: The Political Ecology of Conflict" *Environment* 38, 1996 pp. 6-5 cited in Paskal, C "How Climate Change is pushing the Boundaries of Security and Foreign Policy" available at se2isn.ch/serviceengine/files/ESDP/47759/.../bp0607climatecp.pdf.

26 Climate Dispute Security available at "Climate Change security" at [http://climatelab.org/climatechange security](http://climatelab.org/climatechange%20security), last visited on 30/01/2011, 3pm.

27 Raymond W.A 'Kyoto Protocol' Micro Soft Encarta 2009 DVD Microsoft Corporation 2008.

third mechanism was to gain emission permits for helping developing nations to avoid or reduce emissions.²⁸

The last two mechanisms have been criticized as having the tendency to encourage emission rather than curtail it.²⁹

The Kyoto Protocol has not been very successful in reducing greenhouse emissions because some developed nation are of the view that this reduction will impact negatively on their economy. The united States for instance have declared that the protocol is unfriendly to American commerce.³⁰ With lack of support from America and Australia, the largest emitters of greenhouse gases, and the lukewarm attitude of many European nations to the protocol, the future of this protocol as an efficient tool in curbing greenhouse emission is uncertain.

The United Nations Convention on the Law of the Sea (UNCLOS) is another international regime on climate change – this will however be discussed subsequently.

Apart from these International regimes, other regional and bilateral treaties with a bearing on climate change are also relevant. Some of these are; Convention on the Protection of the Marine Environment of the Baltic Sea Area 1974, Convention for the Protection of the Mediterranean Seas against pollution 1974, Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from pollution 1978, International Commission for the protection of the Rhine Against pollution 1963, etc.³¹

28 McGinnes, A, Climate Change and the Kyoto Protocol at [www.parliament.uk/documents/commons/lib/research.../rp01-106.pdf](http://www.parliament.uk/documents/commons/lib/research/rp01-106.pdf) last visited on 15/01/2011, 5pm.

29 Ibid.

30 Ibid.

31 See Umoruzike, U.O Introduction to International Law (Ibadan: Spectrum Law Publishing, 1993) p.254.

Unclos and Climate Change

It is not immediately obvious that the effect of climate change on the oceans was in the contemplation of the framers of UNCLOS but a progressive interpretation of the convention accommodates climate change. The preamble to the convention talks about promoting "...the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment."³²

The best way to think of protection of the marine environment is the prevention of pollution and impact of greenhouse gases emissions on the seas.

UNCLOS, Article 1 defines "pollution of the marine environment" as:

The introduction by man, directly or indirectly of substances or energy in to the marine environment, including estuaries, which results effects as harm to living resources and marine life, hazards to human health, hindrance of marine activities including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

Scholars that advocate a progressive interpretation of the convention have argued that the term "energy", in the above definition should be interpreted as increase in oceans temperatures resulting from greenhouse gases emission.³³ Meinhard Doelle argues that the overriding objective of the definition of pollution was to capture a full range of possible threats to the marine environment, that there is no indication that the parties were

³² UNCLOS, Preamble.

³³ Doelle, M. Op Cit.

intending to limit the definition to only those specific threats that were identified at the time.³⁴ He argues further that this interpretative approach would treat UNCLOS as a contract frozen in the time it was made, and this treaty interpretation would relegate many international treaties to irrelevance soon after they are negotiated.³⁵

It is submitted that the progressive interpretation of the convention is preferred to make the law responsive to emerging trends. So, while it is admitted that the "energy" in contemplation at the framing of UNCLOS may have been more local such as land-based effluent from industrial facilities, the term energy can be interpreted to cover changes in temperature that disturb the marine ecosystem. This interpretation is in line with article 293 of UNCLOS which opens the door to a progressive interpretation of UNCLOS obligation by bringing in other sources of international law not inconsistent with UNCLOS.

UNCLOS and Marine Environmental Protection

Part XII of UNCLOS provides for the protection and preservation of the marine environment. Section 1 of this part headed "general provisions" is in effect a transformation of the Stockholm Declaration of 1972 in to the language of a binding treaty.³⁶ Article 192 under this part provides that states have the obligation to protect and preserve the marine environment. Article 193 provides for the sovereign rights of states to exploit their natural resources counterbalancing this right with their duty to protect and preserve the marine environment.

³⁴ Ibid.

³⁵ Ibid.

Article 194 provides for the measures, to prevent, reduce and control pollution of the marine environment. This article is central to any analysis of state obligations under UNCLOS to mitigate climate change as it provides the foundation for the following specific obligations that provide some further guidance on what a state may be expected to do to protect and preserve the environment.³⁷

An obligation for states to act individually or jointly as appropriate.³⁸

- An obligation to take all measures necessary to prevent, reduce and control pollution of the marine environment.³⁹
- An obligation for states to use best practicable means at their disposal.⁴⁰
- An obligation for states to act in accordance with their capabilities.⁴¹
- An obligation to endeavour to harmonize policies with other states.⁴²
- An obligation for states to control activities under their control or jurisdiction so as not to cause damage to other states and their environment.⁴³
- An obligation to prevent pollution from spreading to areas of a states jurisdiction of control.⁴⁴

37 Ibid at P .10.

38 UNCLOS Article 197, 207 (4) and 212 (3).

39 The definition of "pollution" includes the addition of energy to the marine environment.

40 UNCLOS, Article 194(1).

41 Ibid.

42 Ibid.

43 UNCLOS, Article 194(2).

44 Ibid.

- A specific obligation for the preservation and projection of rare or fragile ecosystems, and the habitat of species at risk.⁴⁵

Article 195 provides that states in taking measures to prevent, reduce and control pollution of the marine environment shall act so as not to transfer directly or indirectly, damage or hazards from one area to another or transform one type of pollution to another.

Article 207, dealing with pollution from land-based sources is sufficiently broad to cover greenhouse gases emission. It requires states to endeavour to establish regional and global rules to prevent reduce and control marine pollution from land-bases sources. Article 213 requires states to enforce domestic laws passed in accordance with article 207 and any other international obligation to address land-based sources of marine pollution. It is submitted that these provision though not being very firm, are supplementary to article, 192 to 195. They merely require states to endeavour to control pollution and are therefore less likely to play a significant role in determining state obligations to mitigate climate change. On the whole, it is clear that UNCLOS imposes on states the obligation to prevent, reduce and control pollution of the marine environment, and this duty of preservation of the marine environment is the basis for any state liability in climate change.

45 UNCLOS, Article 194 (1), (2) and (5).

UNCLOS and Climate Change Disputes Resolution

As already stated, UNCLOS imposes a duty on states to preserve the marine environment. Failure to do so would result in harm to some other states, which in turn may result in conflict. Some of these conflicts are settled by negotiation and conciliation while others are settled by litigation. Settlement by litigation entails the imputation of liability for climate change and issuing of prohibition orders and award of damages to affected states.

Section 9 Article 235 of UNCLOS on responsibility and liability provides:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

UNCLOS by this Article provides for state liability for causing pollution and the payment of adequate compensation to affected states, and since pollution under UNCLOS encompasses climate change,⁴⁶ it is submitted that the provisions apply also to climate change. Imputation of liability and payment of compensation are not possible unless causation is established.

The Problem of Causation

Causation in law relates to linking injuries to persons who caused them for the purpose of liability. Causation in climate change disputes is not a straight forward thing; it is non-linear and even complex. This is because the dynamics of climate system are globally integrated.

Assuming that the obligation of states to protect and preserve the marine environment under UNCLOS extends to mitigating climate change, and assuming that the IPCC's Third Assessment Report is sufficient to establish a connection between greenhouse gases emissions and current and predicted future climate change, this leaves the question of causation.⁴⁷ The main challenge of a state claiming injury from the effect of climate change is to establish that some injury has been caused to it due to climate change and that the climate change is partly or wholly caused by the failure of the defendant state to reduce greenhouse emission.

⁴⁶ See page 14 of this work.

⁴⁷ Doelle, M. Op. Cit. P.1.

Case law on international climate litigation is sparse because most cases in this category are resolved by negotiation and conciliation.⁴⁸ So, to analyse the problem of causation in climate change disputes, a hypothetical claim may be useful.

Bangladesh is a country that has suffered terribly the effects of climate changes. A report of 15th October 2010 carried that over 10 cyclones and 50 incidents of formation of low-pressure and depression occurred in the Bay of Bengal. This has badly affected the coastline country with low topography. Hundreds of fishermen were missing in the boisterous storms and fishing activities have been greatly hampered.⁴⁹ The storms according to Dr. Ahsan Uddin Ahmed, an eminent climate scientist, are as a result of increasing sea surface temperature, a consequence of climate change.⁵⁰ And the fourth Assessment Report of Inter-Governmental panel on climate change (I.P.C.C) also supports Dr. Ahmed's argument,⁵¹ noting that the greatest emitters of greenhouse gases are developed nations and that the consequences are suffered most by poor countries. The severity of the situation prompted the campaign for Sustainable Rural Livelihoods (CSRL), an alliance of local and national organizations appealed to the government of Bangladesh to take legal proceedings against industrialised countries for the losses caused by frequent storms.⁵²

48 Khan, M.H. "Bangladesh Climate Victims" at www.csrlbd.org/climatechnage/climatetribunal/victimresponsibilities, last visited on 15/01/2011, 5pm.

49 Khan, M 11. Op.Cit.

50 Ibid.

51 Ibid.

52 Ibid.

Given the above facts, Bangladesh may sue a country like Australia or the United states or both or even more developed countries for large emission of greenhouse gases.

First, a possible argument that much of the greenhouse emissions are done by private individual firm will not hold water because under international law, states are responsible for the actions of their citizens that have cross-border consequences.

The second problem will be that of specific causation. While generally all countries guilty of high emission of greenhouse gases collectively cause climate change globally, it is pretty difficult to show how the emission of a particular country has affected some other specific country. Australia, in the hypothetical scenario under discuss may argue that its contribution to global warming is insignificant. On this note it is submitted that suits of this nature would be better brought against a group of nations that have high records of greenhouse emissions rather than a single country. In this case, the defendant countries will be jointly and severally liable.

Another problem would be to consider the standard against which a state will be measured as a way to decide on its contribution. UNCLOS has not any such a standard; it only provides an obligation for the protection of the environment and by extension, the obligation to mitigate emission of greenhouse gases.⁵³ Recourse may therefore be had to the UNFCCC and the Kyoto Protocol.⁵⁴ The UNFCCC does not impose any binding obligations on states. The Kyoto protocol is inadequate in its collective obligations on states in addressing the climate

⁵³ UNCLOS, Article 192-194.

⁵⁴ UNCLOS, Article 293 allows recourse to Conventions and other rules of International Law not incompatible with the convention.

change problem.⁵⁵ It however creates a framework for industrialized nations to reduce by 5% their greenhouse emissions between 2008 and 2012. So, applying due diligence, the short-falls between expected cuts in greenhouse gases emissions and the current level of emission may become the basis for imputing liability.

It is therefore possible for Bangladesh for instances to by a combination of UNCLOS, UNFCCC, Kyoto Protocol, regional and bilateral treaties and /or the general principles of customary international law⁵⁶ establish causation in respect of climate change damage.

Dispute Resolution Mechanism Under UNCLOS

The dispute resolution scheme of UNCLOS is contained in part XV of the document. The process has three parts. The first provides an opportunity for the parties to agree on a dispute settlement mechanism.⁵⁷ The second set of rules provides for initiating dispute settlement process in the absence of agreement.⁵⁸ The third provides limited subject area exceptions to binding dispute settlement.

Article 279 of UNCLOS provides for peaceful settlement in accordance with provision of the United Nations charter. The peaceful means are to be chosen by the parties.⁵⁹ In the event the peaceful resolution fails, the parties may resort to any general, regional or bilateral agreement between them concerning the resolution of disputes and the decision reached will be

55 Doelle, M. Op.Cit P.13.

56 AN example is the No-harm Rule which forbids a state from causing harm to another state.

57 See UNCLOS, Part XV, Article 279-285.

58 UNCLOS, Article 286-296.

59 UNCLOS, Article 280.

binding.⁶⁰ There is also the option of conciliation according to the procedure under annex V, section 1 or another conciliation procedure.⁶¹

UNCLOS provides for compulsory proceedings entailing binding decision where the already discussed resolution schemes fail.⁶²

Article 278 of the convention provides that:

When signing, ratifying or acceding to this convention or at any time thereafter, a state shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the convention.

- a. The International Tribunal for the law of the Sea established in accordance with Annex VI.
- b. The International Court of Justice.
- c. An arbitral tribunal constituted in accordance with Annex VII.
- d. An arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

It is submitted that the inclusion of the International Court of Justice is not proper. This court should have been made an appellate court by UNCLOS for appeals in the event that a state party is not satisfied with any decision reached under any of the other three options.

⁶⁰ UNCLOS, Article 282.

⁶¹ UNCLOS, Article 284.

⁶² UNCLOS, Article 286.

In the absence of a declaration or where two parties to a dispute have not selected any common procedure in their respective declarations, the arbitral tribunal procedure under Annex VII is deemed to be the procedure selected by the parties.⁶³

Climate Change Litigation in Domestic Courts

Climate change disputes can also be domestic, in which case domestic laws apply instead of international regimes. Part XII Article Art 2101 UNCLOS stipulates that domestic laws and regulations “shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards.”

Consequently, in the United States and Australia, cases have been brought in climate change courts seeking judicial review of government actions in relation to greenhouse gases. In *Massachusetts v EPA*,⁶⁴ the US Supreme Court upheld the standing of Massachusetts and other states to challenge the failure of the United States' Environmental Protection Act (EPA) to regulate greenhouse gases, emission from motor vehicles and went on to hold that the Clean Air Act regulates greenhouse gases as air pollution. As a result of this discussion, EPA is moving forward on several fronts to regulate greenhouse gases emission from motor vehicle and stationary sources. Also, courts in America today are being asked to hold large emitters of greenhouse gases liable for their contribution to climate change.⁶⁵ In Australia, states and environmental organisation are seeking equitable relief and in some cases,

63 UNCLOS, Article 287 (5).

64 549 U.S.

65 Brickley, C. et al. :How to Take Climate Change into Account: A Guidance Document for judges Adjudicating Water Disputes, at www.judges.org/news/news121010.html, last accessed on 18/01/2011, 3pm.

damages, from large coal-fired electrical generators, automobile manufacturers and energy companies under theories of public nuisance, trespass and negligence.⁶⁶

In Australia, cases filed in 2003 against the government revealed the failure of the government to produce infrastructure changes needed to protect flood affected people linking with climate change.⁶⁷

Some legal experts including Mary Christiana Wood, Professor, Oregon School of Law, USA have maintained that the most promising cause of action for fighting climate change through litigation is the public trust doctrine.⁶⁸ The doctrine of public trust is the common law principle originally developed by Roman Empire, which posits that certain common properties such as rivers, seas, shores, forest and air are held by government in trusteeship for the free and uninterrupted use of the general public. As trustee government must protect the natural assets for the beneficiaries of the trust, which are present and future generations of citizens.⁶⁹ It is submitted that this public trust doctrine is a good basis for climate change liability, and may be also apply in international disputes.

Although, UNCLOS does not apply in domestic climate change litigations, UNCLOS provides the international framework for individual states to drawn on in farming their domestic laws. UNCLOS and other international regimes on climate change therefore set a standard for domestic laws. To

66 See *Connecticut v. ELECT*, Power 582 F.3d 309, 39 ELR 2015 (2d Cir. 2009).

67 Khan, M.H Op. Cit.

68 Ibid.

69 Ibid.

this extent, UNCLOS is also a tool in the settlement of domestic climate change disputes.

Recommendations

Having examined the United Nations Convention on the law of the Sea (UNCLOS) as a tool of resolving climate change disputes, the following recommendations stand out.

1. UNCLOS is stretched to accommodate climate change only by a generous and progressive interpretation. There is therefore need for its amendment to incorporate climate change as this more than any other form of pollution is responsible for disequilibrium in the marine ecosystem.
2. The International Court of Justice should not be listed in Article 287 (1) as one of the options of dispute resolution, but should be made an appellate judicial forum for parties dissatisfied with any settlement scheme in the Convention to appeal to.
3. The provision for the right of state at the time of signature, ratification or accession to make declarations and statements regarding the applicability of the convention⁷⁰ should be done away with as this makes enforcement of the convention ineffective.
4. Political leaders must demonstrate strong will to apply and enforce the provisions of the Convention especially as it relates to climate change.

70 See UNCLOS, Article 310.

5. UNCLOS must accord with all environmental and non-environmental treaties connected to climate change. All treaties and regimes or provisions therein in conflict and climate change goals should be repealed so that having conflicting laws on climate change governance, there will be a synergy of international, regional and bilateral treaties against the menace.
6. Having regards to the affinity between climate change and commerce, UNCLOS and other environmental regimes must take into cognizance trade regulations of the World Trade Organization which lean against climate change management and efforts must be made towards bringing such regulations in harmony with the climate change challenge.

Conclusion

Stability in the marine ecosystem has been found out to be central to the peace and well being of an on this planet. Prior to latest scientific findings about climate change, pollution of the sea via land-based affluent, oil, dumping of toxic waste in seas and the likes were the known threats to the marine environment. Going by current scientific knowledge, climate change caused by activities of man not necessarily connected with the oceans can have great impact on the oceans and consequently on mankind physically, socially, economically and politically.

The United Nations Convention on the Law of the Sea being the international regime that defines the rights and liabilities of nations relating to uses of the seas, by right is the legislation that should be invoked in resolving climate change disputes as it affects the oceans. UNCLOS provides a good framework for settlement of sea pollution related disputes and by extension,

climate change disputes. It is however not an adequate tool for the resolution of climate change because change with its intricate is not provided for in it. The short coming of the regime as a tool for resolving climate change disputes is most evident in the causation lacuna in the area of climate change litigation.

But as observed by Haro Van Asset.⁷¹

The very nature of climate change as an issue of sustainable development makes it almost impossible to capture all relevant aspects under a single legal regime, necessitating the consideration of interaction with other regimes.

So, with the assistance of other environment and even non-environmental regimes, UNCLOS can be a veritable tool in the resolution of climate change disputes.

71 Asset, H.V. "Dealing with the Fragmentation of Global Climate Governance – Legal and Political Approaches in Interplay Management" available at.....

Chapter Ten



The Legal Effects of Confessional Statements and Plea of Guilty on Burden of Proof in Drug Trials: Omoju V. FRN as a Case Study

Moses Ediru*

Preamble

This work is concerned with the worrisome manner drug trials are conducted in this country, which is redolent of total lack of understanding and appreciation of the drug problem by the courts. In order to halt the drift towards the development of a prolapse in the administration of criminal justice, it examines the legal effects of confessional statements and plea of guilty on the standard of proof in drug trials using the case of *Omoju v. FRN*¹ as an analytical tool. The rationale for the analysis is to bring to the fore the differing implications for drug and non-drug cases. It is the failure to note the peculiar nature of drug trials and, a fortiori, the special mode of proof that engendered the problems in the case under review.

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¹ (2008) All FWLR (Pt. 415) 1656.

Introduction

Drug trials require forensic evidence. Whereas in other trials requiring forensic evidence, it can be dispensed with, no conviction can be secured without forensic evidence in drug trials. It is a must in drug trials. The procedures for identifying suspected substances are scientific, standardised and therefore give no room for variation. Invariably, the outcome of such forensic investigations is either positive or negative. Furthermore, forensic evidence must be tendered in court as procured. Whether the court will accept or reject the result of the laboratory test having regard to the evidence of the expert has nothing to do with the confessional statement and/or plea of guilty by the accused, hence the standard of proof that the substance is one prohibited by the law is the same in all drug trials.

Succinctly put, did the confessional statement and/or plea of guilty by the appellant obviate and/or lower the standard of proof, through laboratory analysis, that the substance recovered from him is cocaine? In other words, whether the substitution of the word cocaine for heroin in the charge against the appellant could be done casually or after a retest of the recovered substance. Better still, whether the failure by the trial court to order a retest after the substitution rendered the trial a nullity. These are the central issues in this work. Furthermore, whether the justice of the case required that the court, *suo motu*, summon the analyst to give evidence of the drug test.

Facts of the Case

The facts of the case as recounted by Tobi, JSC, in the lead judgment are as follows:

The facts of this case are bizarre, uncouth, life threatening and outrageous, in the sense that it is widely and wildly

unexpected and unusual. They show to what extent human beings go for money and the way humanity adores or worships money. To such human beings, it is either money or nothing and they can die for money. Fortunately, a two-year jail term is not anything near death. It is a case of a human being, not just a human being; a Pastor, a man of God, so to say swallowing 118 wraps or pieces of heroin and excreting same in a toilet at the Nnamdi Azikiwe International Airport, Abuja, in his forced defecation between 4.05 am and 5.27 pm. on 9th March, 2003. That human being and pastor is the appellant.

The story is most sickening and horrifying. Although I dread it, I will tell it in the way the appellant told it in his statement to the officers of the National Drug Law Enforcement Agency. Appellant got his international passport in 2001 and started travelling to the United States on 26th January of that year. His last trip was in October 2002 and he returned in November 2002. Appellant arrived Abuja on 6th March, 2003 for the aborted New York trip. 9th March, 2003 was the day for the trip. He spent three days in Abuja where one Are met him and gave him the ticket for the trip. Are handed over to the appellant 118 wraps or pieces of heroin, which he swallowed with water. Are took appellant to the airport where he checked in his luggage. The screening eyes of NDLEA officials, on suspicion, detained the appellant to wait for nature's call of defecation. That call came at about 4.05 am and appellant started to unload his filled stomach not with food though, but with 118 wraps of pieces of heroin. As he was unable to cheat the call, he excreted a total of 118 wraps or pieces. The trade or commercial value of appellant's business of risk was ten thousand US dollars. His pocket could have been richer by that amount if he successfully executed the bad business. But that was not to be.

Appellant was arraigned on 22nd May, 2003 of exporting 1.1kg of heroin. He pleaded not guilty. On 30th October, 2003, the charge was amended by substituting the word cocaine for heroin. Again, he pleaded not guilty. On 29th January, 2004, the prosecution served on the appellant the proof of evidence. On 29th July, 2004 when the case was called for hearing, counsel for the appellant indicated to the court that his client intended to change his plea. Following this development, the charge was read to the appellant again and he pleaded guilty. Arithmetically, appellant had three pleas, two not guilty and one guilty. The learned trial Judge, Nyako J. sentenced him to a term of 2 years.

What needs to be added at this point is the revulsion expressed by Onnoghen, JSC, in his concurring judgment in the following words:

I have to state from the onset that this is a most worthless appeal by a person who describes himself as a Pastor or man of God but is morally bankrupt; a man that is supposed to lead the people to God who turns out to be the devil in disguise, a shameless man who ought to have hidden his face from the public glare following the serious crime he has committed but rather chooses to parade himself from the Court of Appeal to the Supreme Court in search of 'justice', a man who deserved to be made an example of what a Pastor ought not to be, but was treated kindly by the trial Judge who sentenced him to only two (2) years imprisonment taking into consideration the period he was in custody! The appellant must really thank his stars that he did not appeal against his sentence.²

2 Op. Cit At P.1678 (Para E-F).

It is submitted that the mood in which their Lordships decided the case under review as evident in the degree of revulsion expressed did not allow them to consider the weightier issues capable of rendering the trial a nullity. In other words, the appeal was decided even before their Lordships heard the appellant. With the greatest respect, it is submitted, that too much reliance was placed on the confessional statement and plea of guilty by the appellant without regard to the peculiarities of the mode of proof in drug trials. This is evident in the lead judgment by Tobi, JSC, thus:

The above (referring to the statement by the appellant) is clearly a confessional statement by the appellant in respect of his commission of the offence... A confession is the strongest evidence against an accused person as it determines his guilt in most cases.³

Also, the learned justice of the Supreme Court stated thus:

*The law is elementary that if an accused person pleads guilty, the burden of proof placed on the prosecution becomes light, like a feather of an ostrich. It no longer remains the superlative and compelling burden of proof beyond reasonable doubt.*⁴

In the light of the above pronouncements, the proper approach to assessing the correctness of the decision in question is to examine the legal effects of the confessional statement and plea of guilty by the appellant on both the statutory elements and the composite or formal evidence needed to establish the offence of unlawfully exporting cocaine under S.10 (b) [now

3 Ibid P. 1673 (Para B – C).

4 Ibid P. 1675 (Para B – C).

S.11 (b)] of the National Drug Law Enforcement Agency (NDLEA) Act.⁵

Statutory Elements of Unlawful Exportation of Cocaine

Learned counsel for the appellant, Dr. Amuda Kannike, submitting on issue No. 2 on the burden of proof placed on the prosecution by the law, notwithstanding the plea of guilty, stated as follows:

In order for the prosecution to prove the ingredients of the offence of exporting heroin against the appellant, notwithstanding his plea of guilt, it must be shown that, (i) the heroin has left the shores of Nigeria and that it is no longer in the country; (ii) the heroin has been sent abroad to another country; (iii) the heroin is for commercial sale... the appellant has not exported any hard drug or heroin by whatever name called because he was arrested at the Nnamdi Azikiwe International Airport, Abuja. At best, what has so far taken place is an attempt to export or better, attempted exportation of heroin.⁶

As part of the confusion occasioned by the casual substitution of cocaine for heroin in the charge, the appellant's counsel was still submitting on heroin on appeal, when, in fact, his client was convicted for cocaine. Even the Supreme Court, in the lead judgment, recounted how the appellant swallowed 118 wraps of heroin,⁷ relied on the charge stating that the appellant exported 1.1kg of heroin,⁸ only to affirm his conviction for cocaine. It is submitted, that aside the issue of nullity of the trial engendered by the substitution of cocaine for heroin,

5 CAP N30, Laws of the Federation of Nigeria (LFN), 2004.

6 *Op. cit* P. 1668 (Para F – G).

7 *Ibid* P. 1665 (Para F – G).

8 *Ibid* P. 1671 (Para B – C).

which shall be addressed later in this work, it was also a source of confusion in the proceedings.

The submission of the appellant's counsel quoted above also raised the issue of the statutory elements of the offence of unlawful exportation of cocaine. However, the Supreme Court glossed over the issue when it said:

...it is not available to the appellant in the light of his guilty plea and subsequent documents tendered by the prosecution after the guilty plea. And what is more, the documents were not objected to and were admitted as exhibits A-H. The arguments that the appellant should have been charged with attempt to export the drug is, with respect to counsel, mere play of words or mere rhetoric which pretentiously did not consider the realities of the matter.⁹

Much as this work agrees with the Supreme Court, it is thought that it would have used the opportunity to demonstrate fully the emptiness of the submission by bringing to bear the definition of export under the NDLEA Act and stating the statutory elements of the offence concisely. With respect to the appellant's counsel, the definition of export under the NDLEA Act,¹⁰ does not envisage the physical transfer of the drug from Nigeria to any other country. It was sufficient that the appellant possessed it at the customs airport – Nnamdi Azikiwe International Airport, Abuja. Appellant's possession of the drug at the airport meets the substance of the offence. It

9 Ibid P. 1675 (Para D – E).

10 S. 21 – A person shall be deemed to have exported a narcotic drug or psychotropic substance under this Act, if he brings to or deposits the narcotic drug or psychotropic substance concerned at any time at any customs area, customs station, customs airport, customs port any other customs point generally.

was not opened to the counsel to resort to any dictionary definition of export contrary to that by the NDLEA Act.

For the purposes of correcting the view expressed by the counsel to the appellant in his submission and analysing the case further, this work hereby states the statutory elements (SE) of the offence of unlawful exportation under S.11 (b) of the NDLEA Act as follows:

1. That the appellant was in possession of the drug (cocaine);
2. That the appellant exported the cocaine; and
3. That the appellant had no lawful authority.

In order to ascertain whether or not the statutory elements of the offence with which the appellant was charged was proved at the trial, since he was convicted as charged, it is useful to juxtapose the charge and the confessional statement made by the appellant. The charge reads:

That you, Samuel Ayo Omoju, Pastor, male, adult, on or about the 9th day of March, 2003, at the Nnamdi Azikiwe International Airport, Abuja, exported 1.1kg of heroin without lawful authority and thereby committed an offence contrary to and punishable under section 10(b) of the National Drug Law Enforcement Agency Act, Cap 253 Laws of the Federation of Nigeria, 1990.¹¹

On the other hand, the appellant, in his confessional statement said, *inter alia*:

11 At P. 1671 (Para B – C).

I was in the hotel until Sunday where Are came with 118 wraps of something inside shinning leather which I swallowed all with water. Around 9.00 pm he came to the hotel and brought me to the airport and I checked in one luggage and I climbed upstairs for final screening and went down... After the screening, I was taken downstairs to their office. In the office, I was told that I am being suspected and I will be under observation until I go to toilet to determine if I am carrying drugs. In their office, I went to toilet about 4.05 am and excreted forty-three (43) pieces of hard drug substance... All in all the total of 118 pieces of hard drug cocaine were excreted by me. The drugs were given to me by Mr. Are at Dreamland Hotel.¹²

The Court found the confessional statement to be free and voluntary and the excretion of the drug, which confirmed the swallowing, as evidence outside the confession showing it was true. Coupled with the documents tendered by the prosecution and admitted without objection and the plea of guilty by the appellant, the Supreme Court affirmed his conviction. This work agrees with the Supreme Court's assessment of the confessional statement vis-à-vis the statutory elements of the offence. Also, that the plea of guilty in certain circumstances makes the burden of proof on the prosecution as light as the feather of an ostrich. We dare say that the burden is even lighter if all the prosecution needed to prove to secure conviction in the case were the statutory elements. But as pointed out earlier, the prosecution must produce the composite or formal evidence of the forensic investigations of the suspected substance, which the court must accept before the appellant could be convicted. It is submitted that this burden on the prosecution is not affected either by the confessional statement or plea of

12 At Pp. 1672/1673 (Para G – B).

guilty by the appellant. This is what the court appears to be saying in the case of *Stephenson v. Police*,¹³ when it held that;

It is certainly an error in law in the observance of the law of evidence in finding an accused guilty even on a plea of guilty in relation to a crime the nature of which requires the production of the article concerned or a chemist's report on the article.

Obviously the case under review is one requiring a chemist's report. Whether or not this burden was discharged in the case of *Omoju v. FRN* is the kernel of this review. This leads us to the consideration of the composite or formal evidence in drug trials.

Composite or Formal Evidence in Drug Trials

In view of the confessional statement and plea of guilty by the appellant in the case under review, the prosecution was not obliged to lead evidence on the statutory elements of the offence charged, before the court could convict him. But the prosecution must prove that the law prohibits the (drug) substance in question. Such proof goes beyond mere identification of the substance. The result of the laboratory analysis must show that what was recovered from the appellant contained what the law prohibits in the drug or substance.

To secure conviction therefore, the prosecution was expected to lead admissible, credible and conclusive evidence on the following facts:

13 (1966) 1 All NLR 538 at 543.

1. That a substance (cocaine) was recovered from the appellant;
2. That the substance (cocaine) recovered is the one produced in evidence; and
3. That the law (NDLEA Act) prohibits the substance (cocaine).

The chain of evidence to establish the above facts must not snap, otherwise no verdict of guilty will be returned. Those who collect forensic evidence must employ scientific methods and follow strict procedures right from the crime scene through custody and movement to and including the analysis to avoid contamination and destruction. Consequently, any evidence at the trial tending to show a slight deviation in the procedures for gathering or unmasking the physical evidence at the laboratory renders the report incredible, hence no conviction can be based on it. This is where the substitution of cocaine for heroin in the trial of the appellant in the case under review is situated. The substitution as we shall see anon, was the decisive step in the trial of the appellant. Although forensic evidence to establish facts in legal proceedings is a chain, this work has chosen to examine it under the above heads for ease of reference and understanding.

However, before proceeding with the examination, it is prudent to make valuable comments on the substitution of cocaine for heroin in the charge of 30/10/2003 and the option available to the court by virtue of the amendment. First, the word, *heroin*, as used in the charge of 22/5/2003, is different from the dictionary meaning of heroin- English or medical. It was the denotation of the outcome or end result of the forensic investigations of the suspected substance recovered from the appellant. The word heroin in the charge was given birth to by a process of drug analysis. The result of the analysis could have been any

other drug or substance. It was therefore not possible to substitute it with cocaine at the trial merely by putting pen to paper. Such substitution obviously connotes the substitution of the analytical process leading to the identification of the substance recovered from the appellant as heroin with that for cocaine and/or the report of the laboratory analysis. Worse still, there was no evidence of two forensic reports before the trial court. It is submitted that there is no known chemical reaction that can change heroin to cocaine; hence the substitution arose from the handling of the suspected substance.

Second, this work is of the view that the only options opened to the court after the substitution was to either order a retest of the suspected substance or summon the expert to explain the circumstances leading to the substitution. Such power is granted the trial court by the Evidence Act¹⁴, particularly the proviso to subsection (1) that provides thus:

Provided that, notwithstanding the provisions herein contained, the court shall have the power, on the application of either party or of its own motion, to direct that any such officer shall be summoned to give evidence before the court if it is of the opinion that, either for the purpose of cross-examination or for any other reason, the interests of justice so require.

No doubt, the justice of the case of *Omoju v. FRN* required the prosecution to explain to the satisfaction of the court how heroin became cocaine in the course of the forensic investigation. By the provisions of the EA just quoted, the court was on firm ground to summon the expert or named officer to give such evidence.

14 CAP E14, LFN, 2004, S.42(1) (9)

Again, it should be appreciated that the power of the court under the proviso extends to all persons who participated in the forensic investigation. This is the import of the decision of the Supreme Court in the case of *Nwachukwu v. The State* when it held that:¹⁵

It is not the correct interpretation of this section that only the named officers of the section must be called to testify when the certificate (report) under the section is signed.

It is submitted that the failure by the court to order a retest or summon all those who participated in the forensic investigation to give evidence, in the circumstance of the substitution is fatal to the conviction of the appellant.

It is in the light of the above that this work examines the chain of forensic evidence adduced at the trial to see whether the conviction of the appellant was justified. This is aimed at showing the weaknesses in the prosecution's case. For ease of understanding the examination is segmented into three.

Proof that the Substance was Recovered from the Appellant

In order to establish the fact of possession or that the suspected substance was recovered from the suspect, the exhibit keeper who field – tested and sampled the drug must give evidence of his handling of the drug. He does this by tendering the suspected drug (the bags and their contents) together with the evidence pouch, if available. Also, he has to tender the three forms filled by him on which the names and signatures of the suspect and the two NDLEA witness officials appear. The forms are; (1) Packing of substance form, (2) Request for

15 (2002) 12 NWLR (Pt. 782) 543 at 564.

Scientific Aid form, and (3) Certificate of Test Analysis form. The forms, particularly the Certificate of Test Analysis form contains the result of the field test as well as the weight of the substance. Where the sample was stored before movement to the laboratory, he has to introduce evidence as to the conditions of storage in relation to Standard Temperatures and Pressure (STP).

It should be noted that in the case under review, the prosecution did not tender the Request for Scientific Aid Form.¹⁶ However, the main issue is the result of the field-test contained in the Certificate of Test Analysis form, is it heroin or cocaine? It is submitted that, in the light of the substitution of cocaine for heroin in the charge read to the appellant on 30/10/03, whatever drug is named in the Certificate of Test Analysis form before the Court raised the unresolved issue of the credibility of the forensic evidence with which the appellant was convicted. In this connection, we shall now consider the three possibilities to the substitution issue.

First, if it is heroin, how did it change to cocaine, necessitating the substitution in the charge read to the appellant on 30/10/09? Second, if it is cocaine, which is more like it having regard to the confessional statement of the appellant made a day after his arrest, what happened that the charge of 22/5/09 contained heroin? Third, it was possible that the substance recovered from the appellant was partly heroin and partly cocaine, in which case improper sampling engendered the substitution. The views of this work on these salient but unanswered questions at the trial of the appellant will be made to stand out later.

16 At P. 1675 (Para A – B).

However, it is here sufficient to state that the failure of the trial court to demand explanation for the substitution by invoking its power under the EA,¹⁷ is fatal to the conviction of the appellant, his confessional statement and plea of guilty notwithstanding. It is submitted that ordinarily, the confessional statement and plea of guilty by the appellant were sufficient to relieve the prosecution of the burden of proving that a substance (drug) was recovered from him, especially after the tendering of the necessary exhibit forms but not in the circumstance of the instant case. Oral evidence was needed, not on the contents of the forms tendered but on the circumstances leading to and surrounding the substitution. The failure to adduce this evidence at the trial leads us to the consideration of the vital issues of whether the substance recovered from the appellant was, in fact, what he was charged with.

Proof that the Substance (Cocaine) Recovered from the Appellant was the one Produced in Evidence.

Under issue No. 2, on burden of proof on appeal, the appellant argued that there was the possible tempering with the substance, as there was the possibility of not keeping it in proper custody. This argument did not impress the Supreme Court, which discountenanced the argument in the following words:

Can this be a serious submission in the light of the guilty plea? If the appellant was convinced that the substance was tempered with, why should he plead guilty? What was he pleading guilty to? If the substance was tempered with, is that not a valid

17 Proviso to S.42 (1)(a).

defence open to the appellant. There are more questions but I think I can stop here, hoping that I have made the point.¹⁸

But for the substitution palaver and the nature of forensic evidence in drug trials, this work would have been swayed by the position taken by the Supreme Court. It is still the law that the court can entertain an appeal against conviction after a plea of guilty, if it appears; (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or, (2) that upon the admitted facts he could not in law have been convicted of the offence charged.¹⁹ It is submitted that appreciating the nature of the offence includes appreciating what is required to prove the charge. It is equally submitted that in drug trials, the admission of facts contained in the charge and, a fortiori, the plea of guilty relates only to the statutory elements of the offence charged and not the expert evidence that must be produced in order to secure conviction.

What then are the legal implications of the plea of guilty or the admission of the fact of exporting 1.1kg of cocaine by the appellant in the charge read to him on 29/7/04? Did the appellant appreciate that to be guilty of the offence charged, there must be a positive laboratory report showing that what was recovered from him was cocaine before he pleaded guilty? Did he know and in fact, was he in position to know whether the result contained in the report was correct, having regard to the substitution and the fact that his plea was taken before the report was tendered? Did his admission of the facts in the charge or plea of guilty cure any possible defects in the expert evidence (report) tendered before the court? Better still, if the

18 At P. 1674 (Para B – C).

19 *Essien Akpan Essien V. The King* 13 WACA 6.

report of the test were negative, would the admission or plea of guilty ground conviction? Furthermore, was the effect on the report of the test (expert evidence), by possibly tampering with the substance, as suggested by the substitution, counter-acted by the plea of guilty by the appellant? A conflated no answers the above questions.

In the light of the above questions, this work is on firm ground in submitting that the appellant in the case under review neither appreciated the nature of the charge nor were the admitted facts sufficient to convict him in law. Since the admitted facts and the plea of guilty by the appellant did not extend to facts that could only be proved by forensic evidence, it was the duty of the court under the proviso to S.42 (1)(a) of the EA to ensure that the forensic evidence was credible before convicting the appellant. The substitution of cocaine for heroin at the trial suggested possible tempering with the substance hence the court ought to have rejected the report of the laboratory analysis or ordered a retest of the substance.

After all, it is the law that expert evidence is not binding on a trial court if in its opinion:

- there appears to be some inbuilt contradictions;
- the report is not the product of proper forensic analysis; and
- the report is inconsistent with facts and situations thereby negating a belief or reliance on such an evidence.²⁰

In conclusion, this case, which cited and relied on the Supreme Court decision in *U.T.B v. Amanzigana Ent. Ltd.*,²¹ stated that,

20 Oshinowo v. Oshinowo (2006) 1WRN 122 at128 ratio 4.

expert witnesses are in the same position as witnesses of fact whose evidence must be evaluated and weighed by the court for their worth. This work is of the view that the position remains the same whether the expert evidence is oral or documentary, as in the report of drug analysis. It is submitted that the substitution of cocaine for heroin in the case under review, is redolent of inbuilt contradictions in the expert evidence. It is equally submitted that the report was not a product of proper forensic analysis, which had earlier indicated heroin in the charge of 22/5/03 even though the report thereof was not tendered before the court. Finally, it is submitted that the substitution was a situation negating a belief or reliance on the expert evidence (report) with which the appellant was convicted. Conflating the above submissions, this work posits that the failure of the trial court to evaluate and properly weigh the expert evidence (report in question) is fatal to the conviction of the appellant.

Better still, the court ought to have, *suo motu*, called the expert to explain the circumstances leading to and surrounding the substitution. It is submitted that, to confirm the conviction of the appellant in the face of the above lapses is tantamount to endorsing the extant practice in drug trials whereby most trial courts convict suspects on their plea of guilty without report of laboratory analysis produced before the court. If it is unsafe to convict a suspect in drug trial in the absence of evidence of the nature of the drug²² (positive laboratory report), it is equally unsafe to convict on a report rendered incredible by the questionable substitution in the case under review.

21 (1994) 6 NWLR (Pt.348) 56 at 62.

22 *Stephenson v. Police* (Supra) at 538.

It is therefore worrisome that the Supreme Court, in spite of the unexplained substitution, trivialised the issue of burden of proof raised by the appellant in the following words: "what is this burden of proof palaver? It is submitted that the appeal might have been the most worthless appeal ever" according to Onnoghen, JSC, on the other grounds but obviously not on the issue of the failure of the prosecution to prove the charge beyond reasonable doubt. The unexplained substitution of cocaine for heroin at the trial raised the issue of possible tampering with the substance recovered from the appellant, which cast doubt on the correctness of the report of the analysis. Such doubt ought to have been resolved in favour of the appellant.

In the case of *Summola Ishola v. The State*²³, the court held that the admission by an accused person (as in the instant case) notwithstanding, it was still necessary to have a chemical or scientific analysis of the plants to show that the plant belongs to the genus cannabis and further that:

The prosecution therefore has a duty to prove that once the plant is taken from the possession of the accused, every possibility whatsoever of its being tampered with or is being substituted with another has been excluded... Though there is no evidence that the plants were tampered with, there is no evidence either that the plant could not have been tampered with. There is a blackout for that period of 24 hours and the prosecution has no evidence to clear this. For this reason we hold the view that the prosecution did not prove its case beyond reasonable doubt.

23 (1969) NMLR 259 at 261.

According to the decision in the above case, the appellant was not obliged to give evidence of actual tampering with the substance. Rather, the prosecution must lead evidence to clear any situation or fact pointing to the possibility of tampering with or substitution of the substance with another. It is submitted that the substitution of cocaine for heroin at the trial, like the 24 hours blackout, without any evidence to clear the circumstances leading to and surrounding it amounted to the prosecution not proving its case beyond reasonable doubt.

Now is the time to answer his Lordship's question, "if the appellant was convinced that the substance was tampered with, why should he plead guilty?" First, the appellant need not be convinced that the substance was tampered with, it is sufficient if there is anything suggesting such possibility, like the substitution of cocaine for heroin and the prosecution failed to lead evidence to clear the point. From the nature of the case, the prosecution cannot rely on the plea of guilty by the appellant to sustain the conviction. In other words, the appellant ought not to have pleaded guilty to the offence based on the evidence beyond the court. As stated earlier, his admission of facts or plea of guilty does not extend to facts that can only be proved by forensic evidence, without the proof of which he cannot be convicted, hence he is not estopped from raising any defects in the forensic evidence touching on burden of proof. Further on the merit of the appellant's appeal is the effect of the substitution of cocaine for heroin on the credibility of the forensic or drug analysis report upon which he was convicted.

Proof that the Substance (Cocaine) Recovered is Prohibited by the Law (NDLEA Act)

It is now beyond questioning that in the trial of drug offences there must be a confirmatory laboratory report before the court indicating that the suspected substance is one prohibited by law before the prosecution can secure conviction. This requirement is undiluted by the plea of guilty by the accused person.²⁴ In the case of *Stephen v. Police*, where no such report was produced the court succinctly put the position thus:

It is certainly an error in law in the observance of the law of evidence in finding an accused guilty even on a plea of guilty in relation to a crime the nature of which requires the production of the article concerned or a chemist's report on the article... it is difficult to say that there has been no miscarriage of justice without knowing whether the chemist's report would support the case for the prosecution or not.

The above authority talks of miscarriage of justice arising from such trials but this work is of the view that an accused can not even be arraigned in the absence of such a report, whether or not the prosecution has the inkling that the accused will plead guilty. As no criminal trial can be based on speculation, the substance must have been analysed and the result positive before the accused can be taken to court for trial. To do otherwise is to relish in the realm of permutation.

If the court cannot convict in the absence of a positive report, what is the position with a report procured under questionable circumstances? It is submitted that such a report, as in the

24 *Summola Ishiola v. the State* (Supra) at 261; *Paul Asheke v. The State* (1968) All NLR 589 at 594.

case instant, where the prosecution offered no explanation to the satisfaction of the court and the court on its part failed to invoke its powers under the EA,²⁵ is as good as no report at all. Unfortunately, the Supreme Court overlooked the anomalies in view of the admission and plea of guilty by the appellant in the case under review.

On whether the trial court was right to have convicted the appellant based on the report produced by the prosecution, the issue of substitution of cocaine for heroin in the charge is hereby recalled to demonstrate its effect on the credibility of the report. To fully understand the implication of the substitution, reference is hereby made to the case of *Enogie Ejoba v. The State*²⁶, where the Court of Appeal held thus:

In a trial for possession of substance which in this case consist generally of dried leaves and is often in small quantity and consequently virtually impossible for a person who has seen it once to therefore identify with certainty, there must be proof to the satisfaction of the Court beyond reasonable doubt of the identity of the substance and that the substance found in the possession of the accused is the substance which the Government chemist has examined. Care must therefore be taken by the Police in the marking, custody and handling of a suspected substance, as there is danger of confusion arising or possibility of deliberate interference with the substance.

Dissecting the common principle of law that runs through the above cases, Buba J, in the case of *FRN v. Sha'Aibu Jafaru*²⁷, in discharging and acquitting the accused for failure

25 SS. 42 (1)(a), 223.

26 *Sunmola Ishiola v. the State* (Supra) at 261; *Paul Asheke v. The State* (1968) All NLR 589 at 594.

27 (1989) 1 CLRN 194 at 205; See also *Orido v. COP* (1971) NRNLR 55 at 56; *Ofor v. Police* (1968) NMLR 73 at 75; *Summon Ishiola v. State* (Supra) and *Danjuma Garba v. The State* (1978) 7 FCA 39.

by the prosecution to prove its case beyond reasonable doubt stated, and rightly too, the step-wise and standard of proof required to support the report of laboratory analysis in order to secure conviction in drug trials. According to him, these include:

Where substance like Indian hemp or *cannabis sativa* are found or suspected to have been found on an accused, the substance must be marked for identification.

The person who was entrusted with the substance for safe-keeping should be called to give evidence. The person that kept them should give evidence to the effect that the substance sent for analysis in the Government Chemist were indeed, the substance that were kept in safe custody.

That the possibility of the substance being tempered with does not exist. Where doubt exists it must be resolved in favour of the accused. Where the possibility of the substance being tampered with exist even if there is no evidence of tampering, the doubt "that must necessarily exist" should be resolved in favour of the accused.

The prosecution must lead credible, cogent and convincing evidence that the substance was kept in a custody that is not tampered with and cannot be tampered with. The prosecution cannot rely on the admission of the accused alone.

That even where the accused pleads guilty the prosecution must produce the substance and have it before the court to satisfy the court that the substance is indeed what is alleged.

In holding that the prosecution did not prove its case beyond reasonable doubt in the case of *FRN v. Jafaru (supra)*, the court considered the mix up in the name of the accused, the

quantity of the drug and the date of allegation in the charge sufficient pointers to the possibility of the suspected substance been tampered with, which rendered the result of the analysis contained in the report unreliable. This work is in tandem with the reasoning of the court but submits further that the circumstances that would lead to such an inference are not limited to those in that case.

In the case of *Omoju v. FRN (supra)* under review, the appellant was arraigned on 22/5/03 of exporting 1.1kg of heroin, presumably with a report of forensic analysis indicating heroin, to which he pleaded not guilty. This is because; no suspect can or should be arraigned without a forensic analysis report showing that the law prohibits the suspected substance. On 30/10/03, substituting the word cocaine for heroin, presumably with another report of forensic analysis indicating cocaine, to which the appellant again pleaded not guilty, the prosecution amended the charge. Obviously the appellant was convicted based on the latter report tendered upon his plea of guilty on 29/1/04. It was therefore a situation of two reports for one suspected substance recovered from the appellant, although only one was produced in court. It is submitted that no worse circumstances than the substitution in this case can lead to the inference of possible tampering with recovered substances and the unreliability of the resultant report and hence the conclusion that the prosecution has not proved its case beyond reasonable doubt.

Earlier in this work, it was noted that no chemical reaction is capable of turning heroin to cocaine hence the substitution could not have been engendered otherwise than the handling by the NDLEA officials. The confusion or possible deliberate interference with the substance leading to the substitution cannot even be explained away by the fact that both heroin

and cocaine are prohibited substances. It could have been otherwise, from a non-prohibited substance to a prohibited substance and vice versa. Worse still, the court did not do anything to satisfy itself that the substitution did not occasion miscarriage of justice by calling the prosecution to give evidence of the fact of non-tampering. This leads us to a consideration of S.218 of the Criminal Procedure Act,²⁸ (CPA), to see whether the plea of guilty by the appellant covers the admission of the fact that the substance recovered from him was cocaine, an essential element of the offence charged.

Non-Compliance with S.218 of the CPA

For ease of reference and proper understanding the section is hereby reproduced:

If the accused person pleads guilty to any offence with which he is charged, the court shall record the plea as nearly as possible in the words used by him and if satisfied that he intended to admit the truth of all the essentials of the offence of which he has pleaded guilty the court shall convict him of that offence and pass sentence upon or make an order against him unless there shall appear sufficient cause to the contrary.

The issue raised by the appellant's counsel was "whether there existed strict compliance with S.218 of the CPA when appellant took his plea". This issue, which apparently was directed at the procedure to be adopted by the court in satisfying itself that an accused who pleads guilty intended to admit the truth of all the essentials of the offence was resolved as such by the Supreme Court. The Supreme Court held that in satisfying itself, the court does not go out to meet the accused and

28 Unrep. Suit No. FHC/K/CR/130/03.

whether the Judge is satisfied or not remains his subjective judgment. While this work agrees that the court does not need to meet the accused on the issue, the problem remains whether the facts as stated in the charge and admitted by the appellant, upon which his plea of guilty is predicated were sufficient to convict him for the offence of unlawfully exporting cocaine. Therefore, the issue, properly raised is whether the admission by the appellant of the facts contained in the charge amounted to admitting the truth of all the essentials of the offence charged. This work answers in the negative.

One of the essentials of the offence with which the appellant was charged is that the law prohibits the substance recovered from him. This can only be proved through laboratory analysis. The appellant was not in position to admit this fact. Therefore, the plea of guilty by the appellant did not relieve the prosecution the burden of proving that the suspected substance was cocaine. Unfortunately, the attempt by the prosecution to prove this essential at the trial was marred by the substitution palaver that rendered the report of the analysis unreliable. It is submitted that in the circumstance, the trial court could not have satisfied itself that the appellant intended to admit the truth of all the essentials of the offence charged. It is equally submitted that even though the court is not obligated to meet the accused on the issue, it must nevertheless base its decision on the facts before the court. The law is that where there is sufficient cause to the contrary, as in this case, an accused person should not be convicted on his plea of guilty.

Conclusion

The analysis of the case of *Omoju v. FRN* revealed that confessional statements and plea of guilty impact on burden of proof in drug and non-drug cases differently. In drug cases they relieve the prosecution of the burden of proving the statutory elements of the offence only. The fact that the law prohibits the substance, which can only be proved through forensic analysis, must be proved beyond reasonable doubt to secure conviction.

On the whole, this work holds the view that the admission by the appellant of the facts contained in the charge did not cover all the essentials of the offence of exporting 1.1kg of cocaine as envisaged by S.218 of the CPA. Therefore the substitution of cocaine for heroin at the trial of the appellant without the court satisfying itself that the report was credible and reliable either by calling the prosecution to offer explanation or ordering a retest vitiated the trial.

Chapter Eleven



Consent Provisions in the Land Use Act and the Travail of the Mortgage Industry in Nigeria

L.O. Ogiji Esq.*

Introduction

This article discusses how the requirement for the State Governor's consent to transactions in land, including mortgage, affect the commercial life of the society who use their landed properties to raise loans and advances from banks. In a mortgage transaction usually some security of adequate value is required to be given for money advanced as loan. Here the lender will be protected even if the borrower becomes insolvent, for the lender has a claim to the security which takes precedent over other creditors. The most important of securities is the mortgage.¹ The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, that is, upon payment of the loan, or the performance of the act, the interest shall be reconveyed.² The borrower is known as the "mortgagor" while the lender is known as the "mortgagee".

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1. Megarry, R.E. and Wade, H.W.R, Law of Real Property 4th ed (London, Stevens & Sons Ltd, 1975) p. 885.

2. Ibid.

In summary, a mortgage, therefore, is a conveyance of property subject to a right of redemption and the debt for which the security is created is known as the mortgage debt.³ Mortgage is regarded as an alienation under the Land Use Act, hereinafter referred to as the "Act".⁴ The sections make it clear that any alienation without the Governor's consent is unlawful, null and void.

Procedure for Obtaining the Governor's Consent

Whereas section 22 of the Act has provided that an alienation of a Right of Occupancy must be made with the prior consent of the Governor, it has not expressly indicated how the consent is to be obtained. This has generated some controversies as to when or how this is to be done. One of such controversies is the question whether consent should be sought before or after negotiation.

Relying on a similar provision is the old Law⁵ the court in *Orjiako v. Orjiako*⁶ was of the opinion that the negotiation and the agreement must proceed application for consent but that the agreement was conditional upon the necessary consent being obtained. Hurley, J. presiding the above case stated inter alia, "the only effect of this section in my opinion is to make any agreement to alienate conditional upon the necessary consent being obtained." Also in the case of *Denning v. Edward*,⁷

3. Ibid.

4. Land Use Act Caps L5 LFN 2004.

5. Land and Native Right Ordinance 1948

6. *Orjiako v Orjiako* (unreported) case No. ID/27/55

7. *Dennings v Edward* (1961) Dc 245

It has been argued that the consent of the Governor must be obtained before the agreement is entered into and the subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent, otherwise negotiations will be impossible ... we are of the opinion that there was nothing contrary to the law in entering into an agreement before the Governor's consent was obtained. The legal consequences that ensued were that the agreement was inchoate till the consent was obtained.

It follows therefore that there must be some form of negotiation between the buyer and the right holder and it is only after this has reached a certain stage that the right holder can approach the Governor for consent. The principle stated above is in line with the Act⁸ which requires the right holder to furnish the Governor with some details. This clearly implies that there must be some agreement.

However, this continued until it was resolved by the Supreme Court. In the case of *Yaro v. Arewa Construction Ltd*,⁹ plaintiff/appellant filed an action before the High Court Kano against the defendants/respondents. The defendants/respondents were (1) Arewa Construction Limited (which was in receivership) (2) United Bank for Africa Limited (the mortgagee) and (3) Alhaji Mudi Yaro Mohammed (the mortgagor).

8. section 22 of the Land Use Act.

9. *Yaro v Arewa Construction Ltd* (2007) 6 KLR (pt 240) p 2905. see also the case of *Iragonima v River State Housing and Property Development Authority* (2003) FWLR pt. 169 p. 1233.

In the appeal the 3rd respondent raised an objection on the question of prior consent of the Governor by assertion of section 22 of the Land Use Act. The Supreme Court as per Chukwuma-Ene, J.S.C held thus:

The 3rd respondent has raised the question of section 22 of Land Use Act; concisely, the section requires the Governor's consent to the mortgage deal has to be first had and obtained, otherwise the contract is void. I think with respect that the 3rd respondent's obligation is lamely in that as decided in Awojugbagbe v. Chinukwe & Anor (supra) it is after the mortgage has been executed that obtaining of Governor's consent falls due. It is normally after the parties have agreed that the Deed of Assignment is prepared and sent for Governor's consent. The instant mortgage thereafter has not fallen foul of section 22 of the Land Use Decree.

It is, therefore, a misconception to argue that as the prior consent of the Governor was not sought nor obtained before the Deed of Assignment is executed; the assignment is null and void. With this decision, therefore, the issue appears settled that negotiations that take place prior to the consent of the Governor is not only lawful but has created rights and duties. The decision applies mutatis mutandis to transactions to alienate generally.¹⁰

10. Iragonima v. River State Housing and Property Development Authority (Supra); see also Manu Ltd v. M/S Ola I Ltd (2007) 5 K.L.R. (pt 237) p. 2235.

The Challenge of Mortgage Transaction under the Land use Act

Credit transaction such as mortgage is one aspect of the economic life of the country in which the consent provisions is said to have a negative impact.¹¹ According to Adeoye and Oguniran,¹²

Since the promulgation of the Act ... the real securities market has been characterized by uncertainties, inconsistencies and invalidations. There is now a widespread cynicism and confusion over the viability of the right of occupancy as security for advances, and this has been greatly aided by the unsalutary effect of the consent provisions on these transactions... the consent provisions, as already outlined clearly show that any transfer by a holder of the right of occupancy is expected to be with the consent of the appropriate authority. This is because the operative word is "alienation" by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor or Local Government as the case may be.

The mortgagee who ventures into giving credit facilities on a security without consent may find it too costly eventually¹³ In the case of *Savannah Bank Ltd v. Ajilo & Anor* (supra), the plaintiff/respondent was the owner of land in dispute which he acquired under a Deed dated 23rd June, 1965. By a Deed of mortgage dated 5th September, 1980, the land was mortgaged to the Defendant/appellant to secure money owed to it by the

11. Adeoye, F.O. and Oguniran, H.D. "The Socio-Economic Implications of the Land Use Act," published in *The Land Use Act: Administration and Policy Implication*, edited by Olaide Adigun. (Department of Private and Property Law, University of Lagos, 1991). P. 77.

12. Ibid.

13. Ibid.

second plaintiff/respondent. The Governor's consent was not obtained to this transaction. When the plaintiff/respondent defaulted in repaying the amount secured, the defendant/appellant resorted to the exercise of its statutory power of sale whereupon the 1st respondent instituted an action seeking a declaration that the Deed of mortgage was a nullity on the ground, *intā alia*, that the consent of the Governor was not obtained for its creation as required by section 22 of the Act.

After a detailed consideration of the authorities cited before him, the learned trial Judge,¹⁴ acceded to the plaintiff/respondent's claim, holding *intā-alia*, that "failure to obtain consent of the Governor under section 22 of the Act has rendered the Deed of mortgagee ... null and void *ab initio* and the mortgage transaction illegal ..."¹⁵

The later appeal by the Bank to the Court of Appeal was dismissed and the judgment of the lower Court affirmed. At their further appeal to the Supreme Court, the learned justices of the Supreme Court upheld the decision of the Court of Appeal, affirming that the consent provisions apply to a right of occupancy deemed granted as the one in question; therefore, the failure to obtain the consent was fatal to the transaction.

The above judicial decision, was noted to have revealed the reality of the consent provisions of the Act and its implication on the lending industry.¹⁶ Admittedly, it has led to reluctance on the part of lending institutions to accede to the request of loan and advance seekers.¹⁷ Obaseki, J.S.C who delivered the lead judgment pointed out its likely adverse effects on banks and other lending institutions in the following *obita dictum*;

14. Hotonu, J.

15. Adeoye, F.O. and Oguniran, H.D. *Op. Cit.* p. 82.

16. *Ibid.*

17. *Ibid.*

*It is bound to have a suffocating effect on the commercial life of the land and house-owning class of the society who use their properties to raise loans and advances from the banks. I have no doubt that it would take the whole working hours of the State ... Governor to sign consent papers (without going half way) if these clauses are to be implemented. These areas of the Land Use Act need urgent review to remove their problem nature.*¹⁸

In the light of the above dictum, Oluwajana¹⁹ observed that the implication of the provision goes beyond merely faulting the transaction in which the Governor's consent is not obtained. This paper wholly associates with the view of this author. The situation calls for a serious attention to be given to the "suffocating effect on the economic life" of the people of this country. The truth is that the requirement of Governor's consent is no longer taken for granted by the banks or other lending institutions.²⁰

While it is not in controversy that the Act is clear on the need to obtain Governor's consent to all mortgages, (whether it be a deemed or actual grant) it has been argued that if the counsel in the case of *Savannah Bank Ltd v. Ajilo & Anor (supra)* had not rested his case solely on the fact that it was unnecessary to obtain Governor's consent to a mortgage of a deemed grant, the appeal would probably have succeeded.²¹ It is little wonder then that in that case, Belgore, J.S.C expressed his disappointment

18. Quoted from the Supreme Court judgment in *Savannah Bank v Ajilo (supra)*, per Obaseki, J.S.C. at p. 308.

19. Oluwajana, K. "The Land Use Act and the Banking Industry", in *The Land Use Act: Administration and Policy Implication*, edited by Olaide Adigun, (Department of Private and Property Law, University of Lagos, 1990) p. 114.

20. *Ibid.*

21. *Ibid.*

that the feature of the appeal before the Supreme Court confined it self to section 22 and 34 of the Act.

For instance, it is the duty of the mortgagor to obtain the Governor's consent for the transaction to be valid, but in the case of Savannah Bank Limited the mortgagor failed in his duty to do so, yet was allowed to benefit from his own wrong doing. According to this school of thought, this issue was not raised before the court, but that the argument was strictly on the question whether or not consent was required for a deemed grant to be validly mortgaged; and the mortgagor, (in this case, Ajilo) would not have been allowed to benefit from his own wrong doing. Citing the case of *Sholanke v. Abed*,²² Oluwajana²³ argued that if the document in question was defective in a manner as to make the transaction void, the court should hold that the defendant could not be allowed to take advantage of his own wrong doing to avoid the obligations under the contract. Thus, in *Adedeji v. National Bank*,²⁴ the mortgage transaction was without the Governor's consent. Mr. Adedeji defaulted and in an attempt to prevent enforcement of security, contended that the transaction was void. This contention was dismissed as it was the view of the court in this case that Mr. Adedeji should not be allowed to benefit from his own wrong doing since it was his duty to obtain the Governor's consent. It was also the dictum of Kayode Eso in the case of *Oilfield Supply Centre Limited v. Joseph Lloyd Johnson*²⁵ that "certainly equity will not permit the company to benefit from their own illegality."

22. (1962) NRNLR 92.

23. Oluwajana, K Op. Cit. p. 114.

24. (1986) Sc 30.

25. Oluwajana, Op. Cit.

Oluwajana,²⁶ therefore, submitted that the maxim "*Ex-turpi causa non-oritur Actio*" should offer some protection to the party that parted with money in the transaction. He should not be the victim of the mortgagor or Assignor's illegal act.²⁷

But in a more recent case of *Union Bank Plc v. Ayodare & Sons Ltd* the Supreme Court held that where the mortgage is void for noncompliance with section 26 of the Land Use Act, *Ex-turpi Causa* maxim cannot avail the mortgagor. In that case the Plaintiff/respondent filed an action before the Lokoja High Court of Kogi State, against the Defendants/appellants. Plaintiff claimed, *intia alia*, (1) a declaration that plaintiff would not be indebted to 1st defendant in the sum of N307,680.25k or any sum at all; (2) a declaration that the deed of mortgages between the parties be declared null and void for not being duly executed as required by law as no proper consent was obtained from the Governor and the relevant Local Government. The parties filed and exchanged pleadings after which the suit was tried. The trial judge found in favour of the plaintiff in respect of four of his claims. The defendants' appeal to the Court of Appeal was dismissed; and on further appeal to the Supreme Court the following issues were raised for deliberations. The Supreme Court took the view that it was undesirable to invoke the maxim *ex turpi causa non oritur actio* in that case. The Supreme Court in relying on the decisions of both the High Court and the Court of Appeal below quoted same as follows:

26. *Ibid.*

27. (2007) 4 KLR (pt 235) 1997.

*Although the 1st plaintiff/respondent by the tenure of the Land Use Act committed the initial wrong by alienating his statutory right of occupancy without prior consent in writing of the Governor, the express provision of the Land Use Act makes it undesirable to invoke the maxim 'ex turpi causa non oritur actio' and the equitable principle enshrined in the case of **Bucknor-Macleans v. Maks Ltd** (1980) 8 – 11 SC 1*

The Supreme Court, per Oguntade, J.S.C then held further as follows:

*I am satisfied that the two courts below were right in following the decision in **Savannah Bank v. Ajilo** (1989) 1 NWLR (pt 97) 305 in view of the fact that this court had directly adverted its mind to the State of the law and judicial authorities on the equitable doctrine in the maxim *ex turpi causa non oritur actio*... the decision of the court in **Ajilo** is still binding on this court.*

Section 26 of the Act provides as follows:-

Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.

The decision in the case of **Union Bank Plc** (supra) confirms the decision in **Savannah Bank's** case and also further confirms the fear and the reluctance of lending industry to advance money to the public through mortgages as security for loan. The decision in the case of **Ajilo**, (which was followed in the case of **Union Bank Plc**) made over three decades of the existence of the Land Use Act shows that there is no change in the judicial

attitude on the subject of Governor's consent since the inception of the Act especially as the provision of the Act is clear on the subject. It also shows the difficulties which Nigerians have been passing through for over three decades now. It again shows the level of setback development has suffered under the instrument of the Land Use Act. There is, therefore an urgent need of the review of the Land Use Act in this regard. Onnoghen, J.S.C. in a dissenting judgment in that case warned that to allow the mortgagor, (whose duty it was to obtain the Governor's consent, but failed to do so) to go scott free would not meet the ends of justice. He said that would amount to allowing the mortgagor "to eat his cake and still have it back".

Going by the lead judgment, therefore, the mortgagee bank could not recover the money it advanced to the mortgagor. This will obviously lead to a serious caution and reluctance on the part of lending institutions to advance money under mortgage transactions. That negative development has obviously led to the stagnant growth of the mortgage industry in Nigeria. Another issue that comes to mind here is what becomes of the money advanced to the mortgagor, if the case is dismissed for failure to obtain the Governor's consent?

Onnoghen, JSC in the case of *Ayodare* (supra) said, it was wrong that the mortgager, after obtaining the loan and utilizing it would turn round, "when called upon to repay same with interest as previously undertaken, to say that there is no approval to the transaction... the court should resist at all cost the attempt at using it as an engine to further fraud or cheating or dishonesty".

It is submitted that the money should be recovered based on the enforcement of a contract for specific performance since there was a contract between the mortgagor and the mortgagee

before the deed of mortgage, the basis on which the Governor's consent was to be obtained which failed. Both the memorandum of agreement and the deed of mortgage should be admissible for the purpose of the contract for specific performance, which should be relied upon by any of the parties who has met his own obligations in the contract, and in this case by the mortgagee for the recovery of the money advanced under the contract of mortgage.

Sometime in June 2008, the Minister of State for Environment, Housing and Urban Development, in the Administration of President Musa Yar'Adua, Chuka Odom²⁸, hinted that there was an executive bill already passed to the National Assembly to remove Governor's consent from the Land Use Act.

Speaking in Abuja at the International Workshop on 'Developing Real Estate Investment Trusts (REITS) Companies in Nigeria', the minister said:-

We have forwarded to the National Assembly a set of laws we believe need amendment. One of them is the Land Use Act. We believe if we can amend section 21 and 22 of the Land Use Act, it will remove the requirement of the Governor's consent. We believe this will encourage mortgage financing, high participation by both foreign and local investors in housing delivery, accessibility of loan facility from financial institution by holders of land title documents as well as a reduction of cost of land documentation and cost of doing business in the country ... The title you can enjoy from any piece of land today is either a statutory Right of Occupancy or Customary Right of Occupancy. In either case, you

28. Oretede Florence, "Government moves to Remove Governor's Consent from the Land Law", in "The Guardian" Newspapers, Monday June 16, 2008, pp. 31 and 35.

need ... consent to anchor that title document. Now beyond that, if you need that instrument to obtain money from a financial institution, you need to enter into another arrangement called 'deed of legal mortgage' ... The processes of land documentation and mortgage financing in Nigeria cannot take root. There are certain laws in housing sub-sector that make housing delivery in the country very difficult to achieve. Some of these laws include the consent provisions ... which are investor unfriendly ... the deed of legal mortgage as defined by the Land Use Act needs also the Governor's consent. What this means is that there is a double consent procedure in any land transaction in Nigeria before you can collateralise (sic) any form of mortgage and we believe this is against the known spirit of best practices worldwide. I don't see why title documents that have been signed by Governors will not anchor a commercial transaction without requirement for further consent of the same Governor.

Conclusion

These statements coming from the executive amounts to an official acknowledgement of the difficulties posed by the consent provisions in the Land Use Act; and a bow to the unrelenting clamour by the public for the review of the Act.

It is obvious from the various negative effects of the economic life of the society reviewed above, that the objective for the requirement is not wholly satisfactory. The use of the consent requirement, therefore, frustrates rather than enhances mortgage transactions in the country. This in turn inhibits business transactions.

The economic life of the country has suffered frustration unabated, since the promulgation of the Land Use Act over three decades ago. The earlier the provisions on consent are amended to tilt in favour of easy mortgage transactions, the better for Nigerians.

Chapter Twelve



Is a Practising Lawyer/Judge in Nigeria an Anachronism?

Peter Ocheme*

Introduction

The entry point or prescribed minimum attainment for our discussion, which ipso facto, becomes the benchmark, below which nothing but proliferation makes meaning in the Faith we profess in Jesus Christ and in the practice of Law either at the Bar or the Bench, is that there is hardly a worthy Christian Lawyer – nay a Judge – who is not conscious of the onus of the neighbour principles. In other words, in these later days, neither the teacher of law¹ nor the practising lawyer² can justifiably ask the question: “Who is my neighbour?”³ This minimum bench mark is so for the Christian Lawyer, because,

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1 Nihil Obstat; R.C. Fuller, Good News Bible, St Pauls, Mumbai, India, 1976, Gospel of Luke 10:25-29.

2 See Section 4 of the Legal Practitioners Act, Cap L11 Laws of the Federation of Nigeria, 2004. (hereinafter referred to as “LPA”).

3 Luke 10: 29.

having been admonished⁴ and instructed,⁵ his answer will not only be in legal accord with Lord Atkins in the case of *Donoghue v. Stevenson*⁶, but also with Jesus in His parable of the Good Samaritan.⁷ How much of this assumption is taken by the reader of this piece determines the level of subscription or otherwise to the philosophy developed in this Article.

Alas! it is the failure by so many to remain as faithful as required either to the Catechism or the Ethics of the legal profession that has given birth to the streams of such deviants who claim to be both Christians and Lawyers in the variety of our times. This is not to crown Christianity as being any better than the other religions, since Jesus neither condemned any religion but rather worshipped in the synagogue of any territory he went to. This Article, therefore, does not pretend to have investigated the justifications (if any) for such deviations, but seeks to reiterate that anyone who does so will not escape the wrath of earthly or eternal justice, and ipso facto, urge all to believe and obey. The position taken by this Article is that there can be a truly practising Christian Lawyer – (and of course, a Judge), and even non-Christians lawyers attaining eternal glory with God, when we consider the warning given to the Apostles against their query for those who were not in their camps but yet could cast out the devil in the name of Jesus⁸.

4 Ibid. verses 30-36.

5 See Sections 9 and 11 of the LPA.

6 (1932) AC 562.

7 Luke 10: 30-36.

8 See Mark 9: 36 -41; cf. Luke 9: 49-50.

Dilemmas for the Christian Lawyer of all Ages

Because the practice of law at all times and in all places relates to the critical relationships between God and man⁹ on the one hand and between man and his fellow man, the biblical stories have been very much told of the numerous encounters between Jesus and the Lawyers.¹⁰ The juxtaposition of the above anathema can equally be gleaned from the array of "Advocates" who today parade our courts and social service systems in the name of "Lawyers". The Legal Profession as practised in Nigeria today¹¹ is polluted with all manner of persons with their hangover of idiosyncrasies taking onto the course of life without defined objectives.

What becomes apparent is that when the ambers of the Legal profession as currently conceived and practised within the Nigerian society are fanned against the virtues of Christianity, there appears a clap of irreconcilable flames of discontent and dissatisfaction, if not despair. In such a circumstance, it takes only the Grace of God as dispensed through His Son Jesus Christ, for a true Christian to practice law in Nigeria or for the Nigerian lawyer to aspire to true Christianity. And as it was difficult for the Sadducees and the Pharisees,¹² it is little wonder why so many of us, either at the Bar or at the Bench, have deviated not only from our Baptismal vows but also from our professional responsibilities at the Bar and the Bench. Although this writer has not tasted the pills at the Bench, he fears if it is any sweeter.

9 Because this Article is gender sensitive, all references to man and his derivatives, except expressly stated otherwise, refer *mutatis mutandis* to woman and her derivatives.

10 For example, see Mathew 9: 14-17; 15: 1-9; 10-20, etc.

11 Today is a relative term to be kept by this Paper as referring to times after the last decade of the 20th century.

12 See Mathew 23: 1-8; cf. Mark 12: 38, 39; Luke 11: 43-46; 20: 45, 46.

The moral of this write-up lies in reiterating the virtues¹³ as against the vices¹⁴ all of which bacon to every lawyer, nay a Judge. And for the Christian lawyer or a Judge, these become greater hurdles to cross, given the biblical encounters between the Sadducees and Pharisees on the one hand and Jesus on the other hand;¹⁵ not least minding the attendant warnings¹⁶ handed down at each of such encounters in particular.

In other words, there are apparent dilemmas for us who chose to be called to these two important posts of life! The experience recounted here represents the struggles between these two important posts of life – both of which are necessary entrances to the Eternal Kingdom promised by Jesus Christ – Himself being the Most High Advocate! These dilemmas were foreseen and foretold by Jesus Christ and many of the early Apostles and Saints have lived and shone through the two posts of life – not the least among whom was St. Paul.¹⁷ With due respect, at this juncture, it is imperative that we consider some of these dilemmas.

The Dilemma of Lip Service

Jesus, in no small terms, did warn His listeners against the hypocritical practices by the teachers of Law and the Pharisees. On one of such occasions, He said:

13 Virtues like practising what you preach or doing unto others what you want them to do to you.

14 Vices like living above the law.

15 See for example, Mathew 22: 15-22; 23 – 33; 34-40.

16 See Mark 12:38-40; cf Mathew 22:41-46; Luke 20: 41-46.

17 See Acts. 8 and 9 where St. Paul (as Saul) was quoted as being responsible for the death of Stephen ; and himself acknowledging to have persecuted the Church before his conversion. In all of these, Paul as Saul was doing his legitimate duties.

The teachers of Law and the Pharisees are the authorised interpreters of Moses' Law. So you must obey and follow everything they tell you to do; do not however, imitate their actions, because they do not practice what they preach. They tie onto people's backs loads that are heavy and hard to carry, yet they are not willing even to lift a finger to help them carry those loads...¹⁸

In juxtaposition with the legal profession in Nigeria, we observe the attitude of many lawyers who evade their professional responsibility to pay annual practising fees, and for whom the Legal Practitioners Act clearly states that:

No legal practitioner (other than the Attorneys-General of either the Federation or the States) shall be accorded the right of audience in any Court in Nigeria in any year, unless he has paid to the Registrar in respect of that year, practising fee as is from time to time prescribed by the Attorney-General of the Federation after consultation with the association.¹⁹ (the interpretation in parenthesis is mine).

This ugly phenomenon is observed even with lawyers who sue on behalf of clients for the realization of taxes, rates and tenements. Even when oppositions are taken in such circumstances by counsel on the other side, he is viewed by other colleagues as a malicious fellow and one who appears to be more catholic than the Pope.

18 See Mathew 23: 1-4; cf. Mark 12: 38, 39; Luke 11:42, 43.

19 See Section 8(2) of the LPA.

The Dilemma of the Legitimacy of Taxation

In Nigeria, as in many economies old and new, there are raging issues of the legitimacy for the governor to impose taxes on the governed and the collection strategies vis-à-vis the social responsibilities of government on the one hand and such issues of corruption, tax avoidance and evasion on the other hand; coupled with the questions of justification for either side of the coin. These issues have, fortunately or unfortunately not been made easier to understand or to be let go by Lawyers consulted by either side of the divide. In a Federation, such as Nigeria, the issues of authority to generate revenue through taxation, or how much percentage is determinable vis-à-vis those as to resource sharing and allocation formulae against the backdrop of derivative principles, have plagued social scientists of all times, and was not any less with Jesus and the lawyers.

And so, as it is the practice by many lawyers of our times in raising variety of questions, not the least as raised by this writer here, “some Pharisees and some members of Herod's party were sent to Jesus to trap him with questions”.²⁰

*Teacher, we know that you tell the truth, without worrying about what people think. You pay no attention to anyone's status, but teach the truth about God's will for the people. Tell us, is it against our law to pay taxes to the Roman Emperor? Should we pay them or not?*²¹

²⁰ See Mark 12:13.

²¹ Ibid, verse 14.

The above question emanated from the political philosophy of civil disobedience to a non-constitutional or non-democratic authoritarian rule, as against the democratic principles of obedience to the rule of law. And so, "Jesus saw through their trick"²² and perhaps worried ("Why are you trying to trap me"²³), answered them demonstratively by asking to examine the currency with which the taxes were demanded, after whose ownership was confirmed, He declared: "...pay to the Emperor what belongs to the Emperor and pay to God what belongs to God".²⁴

In another biblical text²⁵ the issue arose as the legitimacy of taxing citizens as well as foreigners in the country. When Jesus assessed the situation in consultation with his disciples and reasoned that it was not proper "to offend the taxing authorities", they carried out an economic activity to find the sum with which to pay the tax for himself and his disciples.²⁶

The Dilemma of undue Reverence to Titles and Designations

It will appear that in none other but the legal profession, and especially in the Commonwealth and or the Common Law countries, do the practitioners observe in conduct and in speech a high level of reverence to seniority, title holders and designated officers of the Law. By written²⁷ and unwritten conventions, we (legal practitioners of all ages and ranks) not only "worship" the Magistrates but also bow profusely to their Lord Justices and Masters of the Rolls; while "honouring" even the lay

22 Ibid, verse 15.

23 Ibid.

24 Ibid., verse 16.

25 See Mathew 17: 24-25.

26 See Ibid., verses 26-27.

27 For example, Body of Benchers Regulations No.26 of 1983; Rules of Professional Conduct for Legal Practitioners, 2007.

judges. In courts and out of courts, in seasons and out of seasons, we accord the highest respect (not fear) to our teachers of law and reverence for those enrolled to practice law in the order of their ages at the Bar and not at birth or any other social relationship. Those lawyers robed in silk take preeminent positions²⁸ and enjoy exclusive rights.²⁹ In the legal profession, the learned disciple could, on appointment, become the Lord and Master of his erstwhile Law Professor; and the latter must bow and pray to the former for Orders in reliefs!

When the above dignified positions and privileges at Law are juxtaposed with the biblical injunctions, and especially Jesus' teachings on kindness, humility and meekness,³⁰ the leader as the servant of all,³¹ the disciple not being greater than his master,³² etc., the modern Christian Lawyer begins to have the dilemma of a conscientious practice against the yeast of the Pharisees and the Sadducees.³³ What should the Lawyer who must avoid the pitfall of his soul in eternity do?

The position taken by this Writer, in this regard, is that of complete submission to the Will of God,³⁴ and even if that means offending human laws,³⁵ so be it. What a relief rather for the Nigerian Lawyer that it is not a violation of the Rules of Professional Ethics that he does not need to use those epitaphs, since he can still humbly address the officers in such terms as "Sir", "With due respect", "May it please the Hon.

28 See Rule 1 of the Senior Advocates of Nigeria (Privileges and Functions) Rules, 1979 (as amended).

29 *Ibid.*, Rules 2 and 3.

30 See Mathew 18:1-4; cf. Mathew 9:9-13.

31 See Mark 10:35-43; cf. Mathew 20: 20-28.

32 See Mathew 16: 11-12.

33 In 1 John 2:17.

34 Acts 5:27-32.

35 J. O. Orojo, *Professional Conduct of Legal Practitioners in Nigeria*, Mafix Books Ltd, Lagos, 2008, p.361.

Court", "My Learned Senior", etc. The dilemma for the Christian Lawyer calling another mere mortal my "Lord" and "Master" is removed by the use of these suggested pleasant-ries while trying to please his earthly master without displeasing his Heavenly Lord.

The challenge of integrity

For the Lawyer as for all professionals, there is the great challenge to be upright in all our dealings. According to Professor Olakunle Orojo, "a heavy responsibility devolves on a legal practitioner by virtue of his profession."³⁶ The teacher of Law gave further prescriptions for the integrity of the legal practitioner in the following terms:

"He is not only an officer of the court who assists in the administration of justice; he is also the defender of the rights of the citizens and custodian of their confidence. In the course of his duties, he risks coming into conflict with the State and even sometimes with the court. He must maintain the rule of law and avoid putting himself in a position where his personal interests will conflict with that of his clients. He must act honourably, for the profession is "the honourable" profession."³⁷ (emphasis in underlining).

The foremost of the Rules of ethics for the lawyer sets the benchmark for all as follows:

³⁶ Ibid.

³⁷ Rule 1 of the Rules of Professional Conduct for Legal Practitioners, , Gazette No. 11, Volume 94 dated 24th January, 2007 as Statutory Instrument (S.I.) No. 6 of 2007.

A Lawyer shall uphold and observe the rule of law, promote and foster the course of justice and a high standard of professional conduct, and shall not engage in any conduct which is unbecoming of a legal practitioner.³⁹

As a corollary to the above, we have recourse to Jesus' teaching on integrity when he gave His disciples the parable of the Shrewd Manager.³⁹ He thereupon charged them with the following admonition:

And so I tell you, make friends for yourselves with worldly wealth, so that when it goes out you will be welcomed in the eternal home. Whoever is faithfully in small matters will be faithful in large ones; whoever is dishonest in small matters will be dishonest in large ones. If, then, you have not been faithful in handling worldly wealth, how can you be entrusted with true wealth? And if you have not been faithful with what belongs to someone else, who will give you what belongs to you?⁴⁰ (emphasis mine).

And provisions were made both in the Rules of Professional Ethics⁴¹ as well as in the Bible⁴² for the consequential Orders to be applied to anyone lawyer – nay a judge – who may venture to flout either injunctions.

³⁹ Luke 16: 9-12.

⁴⁰ See Section 12(1) of the LPA.

⁴¹ See Luke 16: 13.

⁴² In fact He came to fulfill it! See Mathew 5; 17-20; also Mark 12: 13-17. In Isaiah 53 it was stated that by Law and by Force He was taken and no one could plead his cause.

The virtues and the costs for the Christian Lawyer

This paper humbly submits that it is not an anathema for one who is a true Christian, and a Nigerian, to practice either as a legal practitioner or a judge. This is because Christ neither abolished the Law⁴³ nor did He refuse to save the legal advocate.⁴⁴ The virtue of the Christian lawyer is neither to whittle down nor dilute the Law in any form nor to discriminate in its application by changing standards of who comes before the law. Jesus Himself did not avoid the Law. He respected all constituted authorities even while challenging their moral behaviours;⁴⁵ and because He admitted⁴⁶ to an "offence" which attracted death penalty under the Mosaic Law,⁴⁷ He therefore did not die an unjust death,⁴⁸ as some simple minded persons may want to hold. He deliberately chose to go the way of the Cross⁴⁹ - a consequence of His Baptism where the Sinless took upon Himself the punishments due to the sinners, and thus gave an unparalleled advocacy to bear for His clients the legal sentence upon a lawful judgment that resulted in their guilt. This is the same advocacy to which we are called

43 In John 19: 38-40, His friends Nicodemus and Joseph of Arimathea who were Members of the Ruling Council, and secret followers of Jesus asked and received Orders from Pilate for the Body of Jesus for burial after the Crucifixion.

44 For example, in Mark 12: 13 -17 Jesus answered a litmus test on the Law of Taxation.

45 In John's Gospel Chapter 18, the Passion Story involves among other events, the Examination and Cross examination of Jesus first by the Pharisees and subsequently by Pontius Pilate, the Judge.

46 See for example, His claim to be the Son of God (Mathew 26: 42-46); His claim of capacity to forgive sins which by the Law is only a divine duty of God (Mark 2: 1-12; His claim to a Kingdom not of this world (John 18:36).

47 As graphically given in Luke 22:47-17 and 23:1-24, the trial, conviction and sentence of death for Jesus, even though politically trumped up, was conducted in the adversarial order - Himself having been given the opportunity of seemingly a Fair Hearing; even though not under an enabling environment since all his Followers had fled, and with Peter later denying, there was no one else ready to give evidence on His behalf.

48 In not less than three times Jesus spoke to His Disciples about the type of death that awaited Him. Mathew 20: 17-19; cf. Mark 10: 32-34 and Luke 18: 31-34.

49 Mathew 5:3-16; cf. Luke 6: 20-23.

-- the climax of the Christian lawyer; even though this writer is unlikely to go to a mere jail term pronounced for his convicted client, except at best to plead some allocutus on his behalf!

The Cost of a Christian Lawyer

As a Christian lawyer, one is enrolled with Christ in Baptism and so if only we could constantly renew our Baptismal vows alongside our legal vows, the kind of peace promised by Christ -- the peace which this world cannot give -- could still be ours even as lawyers.

The prescriptions for the Christian faithful as given by Jesus Christ in His Sermon on the Mount⁵⁰ are the same as the distillation of the legal professional ethics.⁵¹ Whatever is done outside the two falls away from the tenets of the Christian lawyer. Thus, there cannot be a Christian advocacy where the counsel savours from the loots of a crime in the guise of charging professional fees. Neither should there be a Christian advocacy where the victim of either a crime or a tort or a breach of contract is adjudged to remain in pains without a remedy because a smart lawyer (who is perhaps a Christian?) was consulted by the perpetrator of the wrong to "defend" the atrocity. In the similar vein the cost of being a disciple of Jesus as enunciated below, are equally demanding and challenging to all who professes in His faith:

"Those who come to me cannot be my disciples unless they love me more than they love father and mother, wife and children, brothers and sisters and themselves as well. Those who do not carry their own crosses and come after me cannot

50 Mathew 5:3-16; cf. Luke 6: 20-23.

51 The Rules of Professional Conduct for Legal Practitioners (S.L.6) 2007 or in the Legal Practitioners Act Cap 207, Laws of the Federation of Nigeria (L.F.N), 1990 (now Cap L11 L.F.N. 2004).

be my disciples. If any one of you is planning to build a tower, you sit down first and figure out what it will cost, to see if you have enough money to finish the job. If you don't, you will not be able to finish the tower after laying the foundation, and all who see what happened will make fun of you, saying 'He began to build but could not finish the job'. If a king goes out with ten thousand men to fight another king who comes against him with twenty thousand men, he will sit down first and decide if he is strong enough to face that other king. If he isn't, he will send messengers to meet the other king to ask for terms of peace while he is still a long way off..."

Similarly, having attained the Call to the Nigerian Bar and while in the practice of Law, there come many times the great temptation to align oneself with the client who pays for his cause to be pleaded against all odds, and often to the detriment of the offended. When that temptation comes to you, weigh it against the curse for such a lawyer as contained in the "scale of justice" given in the Holy Gospels of Christ. Then you will realize that the tide of injustice does not abate by the length of punishment prescribed in the Law. On the other hand, while in active legal practice, and even as a Judge we are enjoined to work by the biblical example of the offended seeking forgiveness from the offender.⁵² This will bring great healing to both of them and not the least even to the learned Counsel, more so if one did so upon the Christian Faith.

It will be remembered that under the Jewish customary law, it is the offended who must first seek forgiveness from the offender.⁵³ Peter, perhaps in a bid to justify his knowledge of this Mosaic rule for forgiveness in social relations, came to

⁵² See for example Mathew 18: 15-17; 21,22.

⁵³ In Mathew 18:21.

Jesus and asked: "Lord, if my brother keeps on sinning against me, how many times do I have to forgive him? Seven times?"⁵⁴ To Peter's surprise, and no less a challenge to us all, Jesus answered: "No, not seven times but seventy times seven."⁵⁵ And as if to unravel the shock in the number of times we must do so, Jesus gave the parable of the unforgiving servant, the gist of which is so apposite and worthy to be quoted hereunder:

Once there was a king who decided to check on his servants' accounts. He had just begun to do so when one of them was brought in who owed him millions of dollars. The servant did not have enough to pay his debt, so the king ordered him to be sold as a slave, with his wife and his children and all that he had, in order to pay the debt. The servant fell on his knees before the king. 'Be patient with me,' he pleaded, 'and I will pay you everything'. The King felt sorry for him, so he forgave him the debt and let him go.⁵⁶ (underlining mine)

Then the man went out and met one of his fellow servants who owed him a few dollars. He grabbed him and started choking him. 'Pay back what you owe me', he said. His fellow servant fell down and begged him: 'Be patient with me and I will pay you back'. But he refused; instead, he had him thrown into jail until he should pay the debt. When the other servants saw what had happened, they were very upset and went to the king and told him everything. So the king sent for the servant: 'You worthless slave', he said. 'I forgave

⁵⁴ Ibid.

⁵⁵ Ibid., verse 22.

⁵⁶ Ibid., verses 23-27.

*you the whole amount you owed me, just because you asked me to. You should have had mercy on your fellow servant, just as I had mercy on you.'*⁵⁷
(underlining mine).

At first sight, the above principle appears illogical to strict legal reasoning but incidentally, it has been conceived in our laws, wherein the injured must first cry out for remedy! We will consider a few of the instances where the duty has been placed upon the lawyer to uphold the principle of justice, even at the cost of loss of his income and or ego.

The Lawyer as an officer of the Court

Among the rules of professional conduct is one that regards the legal practitioner as an officer of the court and, accordingly, he shall not do an act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice.⁵⁸ Perhaps in re-echoing a similar rule under the English legal practice, Crampton J, in *R. v.O'Connell*⁵⁹ demanded:

*This Court, in which we sit, is a temple of justice; and the advocates of the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice...*⁶⁰

In an attempt to maintain this standard over a period of almost a century after Crampton J, we heard Lord Denning M.R., in *Rondel v. Worsley*⁶¹, expounded this command in the following order:

⁵⁷ Ibid., verses 28-33.

⁵⁸ See Rule 30 of the Rules of Professional Conduct.

⁵⁹ (1884) L.R. Ir. 261.

⁶⁰ Ibid., at p. 312.

⁶¹ (1967) 3 All E.R. 567.

As an advocate, he is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No one, save he, can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief from any man who comes before the courts. No matter how great a rascal the may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say 'all he honourably can' because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants; or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant document, even those that are fatal to his case. He must disregard the most specific instructions of the client, if they conflict with his duty to the court. The code which required a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the

profession and is subject to its discipline; but he cannot be sued in a court of law.”⁶²

It is this Article's humble advocacy for healthy legal practices among lawyers that leads to the lengthy quote above even at the risk of appearing bogus. In adopting this standard for the Nigerian lawyer, Professor Niki Tobi J.C.A. (as he then was) in the case of *General Oil Limited v. Oduntan*⁶³ stated inter alia, as follows:

Counsel, qua advocates, as ministers in the temple of justice, owe both their clients and the courts a duty, a professional duty to assist the court in the course of their advocacy. They should make available to the court their prolific legal expertise so that so much valuable time of the court could be saved in search of authorities. Where counsel fails to do his homework, the lot of the work falls on the court and that kind of situation can affect the quality of the administration of justice.”⁶⁴

It is not attempted in this article to rewrite the various rules of professional conduct for lawyers in Nigeria. Suffice to say that by the rules and by the various biblical injunctions, we cannot pretend to be ignorant for to do so have both ethical and religious, if not eternal consequences.

Although one may be seen as “weak” in being humble and impecunious in following the rules, lest we forget, God has most often used the “weak” and the humble to overthrow the strong. It was in His surrender to the Cross that Christ defeated the devil. If you as counsel for the offended take the prescribed biblical steps for attaining forgiveness and the offender refuses

⁶² Ibid., at p.993.

⁶³ (1990) 7 NWLR (pt 163) 423.

⁶⁴ Ibid., at p.673.

to yield, treat him as also so prescribed in the Bible⁶⁵, and you will have saved your neck from the shameful end prescribed for many "lawyers" by Christ.

As always, the cost to the Christian as well as to the lawyer remains doing and living in the simplest of forms. The experience of this writer has been that after doing his duty in legal advocacy and instead of charging his fees first, lets the client decide on how much his service is worth. More often than not, what has been offered willingly by the client is beyond what would have been negotiated and to the client's displeasure in payment. In this way, not only that he gets paid for services rendered but that the client's convenience, confidence and continuing patronage is assured and ensured.

Recommendations for the Christian Lawyer

The question might be asked: how many, if any, Nigerian Christian lawyers holding brief for the offended will today go first to the offender and solicit for forgiveness? And yet, when you do (as this writer has done many times) you will discover the healing effects of the wonders in Christ's advocacy. This approach postulates that for both interpersonal settlement and eternal healing, the offended is the one who must first seek forgiveness from the offender! If we do this, which is advocated for in the pre-trial conference for civil matters and even more recently in the procedure for plea bargaining in criminal trials. It is recommended that well before litigation the lawyer should first seek to play the role of a peacemaker.

In the second place, going by the array of duties outlined for the lawyer in either the Legal Practitioners Act or the Rules of

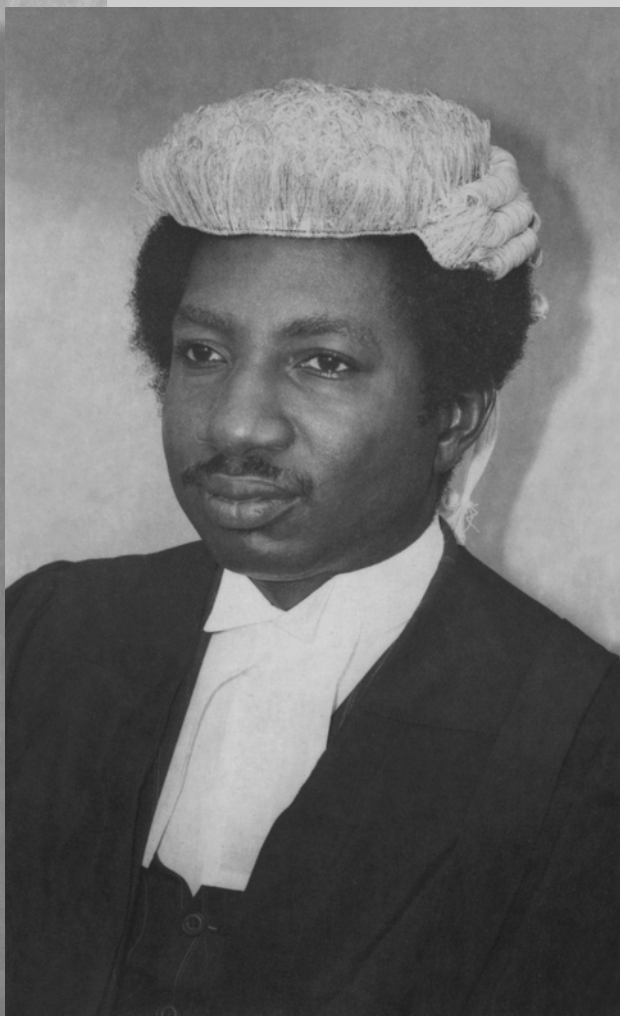
65 For example, see Luke 12:57-59.

Professional Conducts, there is no iota of doubt that the lawyer – nay the Judge – has ample guidance to always play safe so as to avoid the temptations of corruption, dishonesty, ineptitude, or a breach of such ethical standards that may result to a professional misconduct, whether infamous or not. In recent times, we have witnessed a number of decisions of the Legal Practitioners Disciplinary Committee in respect of deviants to the rules, some of which have resulted in the striking off of the names of such persons from the Roll.

Thirdly, and most importantly perhaps, is the desirability to make not only earthly wealth but eternal kingdom. Viewed from any angle of the arguments, it is settled that for every living soul, the need for peace with God is always desirous, and this not the least for the lawyer. Virtually all religions are agreed that the composite result of good behaviour is a heavenly reward and for evil or wrong doings is eternal punishment.⁶⁶

The final humble submission by this article is that the Christian lawyer is neither an anachronism of the biblical injunctions for the profession nor of the customary rules for Legal Practitioners in Nigeria.

⁶⁶ In this regard, it may be easier for he who disagrees with me to provide the authority in contrast.



Iorhemen Hwande
Call to Bar (1978)



Iorhemen Hwande
In full regalia



Iember Orkeghen Guma
His lordship's wife



Iorhemen and Iember
(1976)



**Cutting the wedding cake as
Masenengen looks on.**



**Iorhemen, Iember and Masenengen pose
for a picture after the wedding ceremony.**



His lordship in his chamber



**His lordship during Benue State Judiciary
2010/2011 legal year celebration.**

Chapter Thirteen



The Interplay of the Concept of Insurable Interest and the Principle of Indemnity in Insurance Contracts

V.A. ShimaEsq*

Abstract

The essence of an insurance contract is to mitigate or ameliorate an otherwise catastrophic loss which mankind very often than not experiences due largely to the risky nature of man's life on earth. An insurance business is essentially a contractual arrangement used to transfer, distribute and share these risks among the insured class under which all members contribute to pay the losses of a few. However, there are basically two parties to a contract of insurance i.e., the insurer and the insured or assured. In practice, it is not always easy for the insured to be indemnified by the insurer upon the occurrence of the insured event. This is due largely to the interplay of the concept of insurable interest and the principle of indemnity coupled with the ignorance of the insured on one hand, and the tendency of the insurer to play a fast one on the insured by taking undue advantage of the insured's ignorance of these principles on the

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other hand. This article highlights this and other problems encountered by the insured in pursuing his claims from the insurer and tries to enlighten the insured on how to avoid the pitfalls which appear to frustrate the insured from claiming his proceeds. The article finally recommends that the insurance law should be strengthened to ensure that right from the inception of an insurance contract, the minds of the parties are working *ad idem* on all the issues.

Introduction

The law of insurance requires that an insured must have insurable interest in the subject-matter of the insurance. In the case of *Lawunion and Rock Insurance Ltd. v. Livinus Onuoha*¹, the court defined insurable interest as the assured's pecuniary interest in the subject matter of insurance. This insurable interest must be a legally recognized relationship to what is insured whereby the insured will suffer some financial loss by the happening of the event insured against. The absence of insurable interest makes the contract of insurance a mere gamble and, therefore, unenforceable.²

The principle of indemnity on the other hand, is to the effect that in the event of a loss emerging from an insured peril, the insured shall be returned to status quo ante. In other words, the insured shall be placed in the same position that he was immediately preceding the happening of the event. The insured is, however, not to recover more than the actual loss as this will be contrary to public policy. He is not to make a profit from the loss. In the case of *Castellain v. Preston*³ the court

1 (1998)6 NWLR (Pt. 535)576.

2 See Section 60 (1) Insurance Act, 2004.

3 (1883)11 QBD250.

held that the contract of insurance is a contract of indemnity and the insured in the case of a loss against which the policy has been made shall be fully indemnified but shall never be more than fully indemnified. This principle of insurance law has received statutory recognition from the Nigerian Insurance Act, 2004. Section 62 of the Act places limitation on amount receivable by a person with insurable interest. Such amount shall not be greater than that of the value of the interest of the insured in the life insured or other event. The interplay of the concept of insurable interest and the principle of indemnity plays a significant role not only on the chances of the insured to recover proceeds from the insurer on the occurrence of the insured event but it also determines the quantum of the proceeds to be recovered from the insurer. This article discusses this interplay and its effects on insurance contracts. However, before delving into detailed analyses of these concepts, it is proposed to explore the meaning and nature of insurance contracts generally.

The Meaning and Nature of Insurance Contract

It is difficult to define with exactitude a contract of insurance. Sir Robert Megarry, V.C. expressed doubt in the case of *Medical Defence Union v. Dept. of Trade*⁴ whether a satisfactory definition of a contract of insurance will ever be evolved. This is due largely to the tendency to obscure and occasionally exclude that which ought to be included.⁵ Be that as it may, it is necessary to attempt a working definition of insurance contract for a better understanding of the subject and for enhanced appreciation and comprehension of the legal issues discussed in this article.

4 (1980) 1 Ch. 82 at 89.

5 Templeman J in *Dept of Trade & Industry Vs. St. Christopher Motorists Ass. Ltd* (1974) 1 Lloyd's Reports 17 & 18.

Agbakoba, J. defined a contract of insurance in the case of *Chime v. United Nigeria Ins. Co. Ltd*⁶ as:

A contract whereby a person called the insurer in consideration of money paid to him called the premium by another person, called the assured, agrees to indemnify the latter against loss resulting to him on the happening of certain events.

This definition, with all due respect does not cover life insurance policy because of the use of the word “indemnity” which is not necessarily applicable to life insurance. Life insurance is a non-indemnity insurance contract. This definition is, therefore, a clear example of an under-inclusive definition.

On the other hand, in the case of *Prudential Insurance Co. v. Inland Revenue Commissioner*⁷ Channel J. graphically described insurance transaction thus:

*Where you insure a ship or a house, you cannot insure that the ship shall not be lost or the house burnt, but what you do insure is that a sum of money shall be paid upon the happening of a certain event.*⁸

His Lordship went further to explain that a contract of Insurance must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance.⁹

6 (1972) 2 ECSR 808 at 811.

7 (1904) 2 K.B. 658.

8 Ibid at P. 663.

9 Ibid P. 664.

From the above definition, at least three features of a contract of insurance are clearly identified. First, it is an agreement to pay money or some benefit as opposed to an agreement to prevent the loss from occurring. Secondly, the obligation to pay is contingent and not absolute in the sense that the insured event may or may not happen, and thirdly, the contingent event is one that is basically adverse to the interest of the insured.

Although the Nigerian Insurance Act¹⁰ which regulates insurance business in Nigeria has not defined generally what insurance business or contract is, it has specifically defined an insurer in Section 97 as: "a person who is carrying insurance risk and is registered under this Act for the purpose and includes a reinsurer".

From the attempts made to ascertain the purpose and meaning of Insurance it becomes easier to comprehend the intricacies and working mechanisms associated with insurance business. Through an insurance contract, an insurer which must be an incorporated company¹¹ engages primarily in the business of insurance, promises to pay another, the insured a sum of money or to provide other value upon occurrence of some harmful event. The insurer distributes the risk among a substantial number of persons who pay premiums to the insurer based upon the total estimated losses to be incurred by members of the insured class. In insurance, therefore, the insured in effect exchanges a fixed, certain loss which is the cost of the premium to in order to be indemnified in the event of the occurrence of the risk insured against.

¹⁰ Insurance Act, 2004.

¹¹ By S. 3 (1) (a) to (b) of 2004 Insurance Act, only corporate, companies are permitted to operate Insurance business in Nigeria.

Invariably, therefore, risk sharing among the insured class under which all members contribute to pay the losses of a few, becomes a fundamental characteristic of insurance. In some cases, the insurer will spread the loss even further through reinsurance. Under this arrangement, another insurance company contracts with the original insurer to reimburse it for liability under its own policies. Thus, in reinsurance, the original insurer becomes an insured or reinsured and another company becomes an insurer or reinsurer. This article discusses the problems encountered by parties to an insurance contract, particularly the insured and proffers solutions to them.

Problems Associated with Insurance Contracts

Both the insured and the insurer encounter different problems as they engage in the business of insurance. The first problem encountered by an insured for instance, stems from the fact that insurance contracts are not individually negotiable. Rather, they are complex adhesion contracts which are often not read or understood by the insured. It is a standard form contract, drafted by the insurance company, loaded with fine print, and given to the insured on a take-it-or-leave it basis.¹²

It is in realization of this fact that both the courts and legislature have actively policed insurance contracts and companies to protect the reasonable expectations of the insured. This policing includes extensive government regulation of the insurance industry and strict construction of contract terms against the insurance companies. The courts for instance, construe ambiguous language against the drafter and may refuse to enforce certain provisions by applying unconscionability

12 Roszkowski, M. *Business Law, Principles, Cases & Policy* P. 1017 Addison Wesley. Longman Inc. Reading, Massachusetts.

doctrine designed to protect the party "adhering" to the standard form contract.¹³

In Nigeria, the Insurance Act¹⁴ contains several control mechanisms ranging from requirements for establishment of insurance business to the qualifications of the managers and operators of the insurance business and the control of operations of the business itself.¹⁵

Another problem associated with insurance contracts is the presence of moral risks. The presence of insurance often has motivated schemes to defraud and even murder. In addition, in absence of insurable interest, insurance contracts can be used as a gambling device. In the face of all these problems, there is every need for the law of insurance to police abuses by both the insurers and the insured while at the same time preserving the fundamental business and personal protection afforded by insurance.

The Concept of Insurable Interest

The concept of insurable interest is very elastic and is not always coterminous with ownership, wholly or partial of the particular goods insured. The mere possession of property is probably sufficient to give the person in possession an insurable interest in it.

Be it noted again that it is probably impossible to give a general formula to cover all the recognized types of insurable interest, however, it is generally true that a person who would foreseeably suffer financial loss from the occurrence of an event has an insurable interest in the subject matter which he sought

13 Ibid at P. 1017.

14 Op.cit.

15 See generally parts II, III and IV of the Act.

to insure against the event. Such event must either cast upon the assured a legally binding liability or it must affect a right of the assured, which is recognized and protected by the court. The decision of Blackburn J. that "a party has an interest in an event if he will gain an advantage if it happens or suffers a loss if it does not,"¹⁶ throws more light on this. However, the loss or benefit must depend on actionable legal rights. Mere possibility of loss or gain, which is not founded on any right or liability in respect of the subject matter insured, is not enough.¹⁷

From the analyses made thus far, it is clear that a person is said to have insurable interest in the subject matter insured where he derives pecuniary benefit from its existence or will suffer pecuniary loss when the subject matter is destroyed. Insurable interest is thus a financial interest in the preservation of the property insured. Therefore, a purely sentimental interest or non-monetary benefit will not amount to an insurable interest.¹⁸

Insurable interest is central to the enforceability of insurance contracts. If the insured is adjudged to have no insurable interest in the subject matter of insurance, he cannot enforce that contract of insurance. In Nigeria, any such contract is declared null and void by the Insurance Act.¹⁹ Section 60(1) and (2) of the 2004 Act provides thus:

¹⁶Wilson v. Jones (1867) L.R. Ex. 139.

¹⁷Lucena v. Craufurd (1806) 2 B & P.N.R 269; Scottish shire Line v. London & Provincial Marine Ins. Co. (1912) 3 K.B. 51.

¹⁸Yerokun, O. Insurance Law in Nigeria P. 142 (Nigeria Revenue Projects Publications), C/o Lagos State University Badagry Express Way, Lagos.

¹⁹Op. Cit.

S.60 (1) A policy of insurance made by a person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by way of gaming or wagering.

S.60 (2) A person shall be deemed to have an insurable interest in the life of any other person or in any other event where he stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or even be prejudiced by the death of that person or the loss from the occurrence of the event.

From the above provisions, it is not difficult to see that Section 60(1) of 2004 gives statutory recognition to the concept of insurable interest and further makes the validity of insurance contracts subject to the existence of insurable interest.

The subsection further seeks to protect insurance contracts from abuses of being used as a gaming or wagering contract. Subsection (2) on the other hand, seeks to throw light on who can be said to have insurable interest in an insurance policy.

History and Importance of Insurable Interest

Insurable interest was considered an important requirement of contract of insurance before the English Revolution of 1688. The consideration then centred on demand of public policy to enforce a claim against the assured using insurance as a form of gambling. Under the umbrella of insurance, extraordinary waves of gambling existed, and the trend was further encouraged, as no insurable interest was required in contract of life assured. To control and stop the pernicious practice which may serve

as an inducement to commit murder or suicide the English parliament intervened by passing series of legislation which were laws of general application in Nigeria.²⁰

The importance of insurable interest in the insurance world today lies not only to control unethical practices highlighted above but also in the fact that insurable interest gives substance and support to the principle of indemnity. Contracts of insurance, other than life insurance, generally are characterized as indemnity contracts. An indemnity contract is one in which the indemnitor agrees to save the indemnitee from the legal consequences of the indemnitee's conduct or that of some other person.

The presumption is that a person will only insure a thing or his life to the limit of his interest or equal to whatever financial loss he will suffer in the destruction of the thing insured. The interest is then regarded as a condition precedent to the assured's claim and a condition of insurer's liability. The insurer is bound to indemnify the insured to the amount of his interest in the subject matter. An insurer is not obliged to pay for a loss under a policy if the insured has no interest at the time of the loss.²¹

This writer is, however, highly apprehensive that if not carefully applied, the concept of insurable interest, sound as it is, may become a ready tool in the hands of the insurer to evade a just obligation to the insured. In the case of *M Farlane v. Royal London Freendly Society*²² the court stated that, it is often a technical objection and one which has no real merit, after an insurer has received premium. By allowing an insurer

20 Yerokun O. Insurance Law in Nig. Op. Cit. P. 138.

21 Macaura V. Northern Assurance Coy (1925) A.C. 619.

22 (1886) 2. T.L.R 755.

to default a just claim on ground of no insurable interest is to allow the insurer to evade a just obligation. To forestall this negative utilization of the concept of insurable interest by the insurer, the writer is of the opinion that right from the inception of the contract, the issue of insurable interest be considered and settled between the parties. For the insurer to accept an offer without comment, receive premium from the insured only to turn round and object to indemnify the insured for want of insurable interest amounts to fraud on his part to say the least. To overcome this, it is further suggested that it should be statutorily obligatory for the insurer to inform the insured who intends to take up an insurance policy whether he has insurable interest in the subject matter of insurance proposed by him. For the insurer surely knows the position but keeps quiet, receives premium from the insured and later objects to indemnify him for want of insurable interest. Where the insurer is using lack of insurable interest as a technical objection to evade a just obligation, it is the duty of the court to see that justice is done by compelling the insurer to discharge his obligation to the insured.

It is important to note that even though the purposes of the doctrine are the same for both forms of insurance, property and life insurance are governed by substantially different insurable interest rules. This is because the indemnity principle is much less pervasive in life insurance than in property insurance. The writer shall proceed to consider the different approaches with a view to educating prospective insureds.

Persons having Insurable Interest in Property

A person possesses an insurable interest in property to the extent he or she may be subjected to economic injury if the property is lost, destroyed or damaged. A person holding a legal interest

in the property has an insurable interest to the extent of the value of the interest. Such persons include the outright owner of the property, a life tenant, a remainderman or holder of other future interest in property and a lessor, lessee or subbsee of the same property.

Persons having legal title in a representative capacity such as trustees and executors also have an insurable interest in the property under their control. Such representatives would hold the process of the insurance for the benefit of the beneficiaries of the trust for whom they act.

A shareholder has an insurable interest in corporate property to the extent of the shareholder's proportionate share of corporate assets on liquidation. But he does not have insurable interest in the company as a whole. Thus in, *Macaura v. Northern Assurance Coy*²³ Mr. M insured Timber which was in his possession to a one-man company of which he was the sole shareholder. The greater part of the timber was destroyed by fire. The insurer refused to pay Mr. M, being a mere shareholder of the one-man company on the ground that he has no insurable interest.

Persons holding equitable interest also qualify. For instance, the beneficiary of a trust has an insurable interest in the trust property. Even in the absence of a legal or equitable interest, a mere possessor e.g., a bailee has an insurable interest in the property under his custody as long as he is liable to the owner for the loss of the goods in his possession.²⁴ The possession must be accompanied with legal liability. Thus in *Macaura v. Northern Assurance Coy*,²⁵ it was held that a person who

23 (Supra).

24 *Boehm Vs Beell* (1799) 8 T.R. 154.

25 (Supra).

allows a timber of wood to lie on his land but accepts no duty for its safe custody, has no insurable interest in the property. The list is not exhaustive.

Insurable Interest in Life Insurance

In life insurance, insurable interest arises in two contexts:

- i. Obtaining insurance on one's own life and,
- ii. Obtaining insurance on the life of another.

A person always has an unlimited insurable interest on his or her own life. Inherent safeguards against the dangers of gambling or murder generally eliminate the need to inquire into insurable interest. A person who takes out a policy on his own life and pays the premiums may designate his estate or another person as beneficiary. The beneficiary needs not have insurable interest in the insured's life.²⁶

In contrast, to have an insurable interest in another's life, a person must have some pecuniary interest in the continued vitality of the *cestui que vie*. In addition, the consent of the person whose death triggers payment generally is required.

In certain cases, pecuniary interest or benefit is presumed if the individuals are closely related by blood or law e.g. spouses, father and son, mother and son and minor children automatically have insurable interest in each others lives. In some cases insurance interest is held by the court to exist in the life of a brother and sister. However, other relationships more remote, such as aunts, uncles, and cousins commonly require some additional proof of economic interest e.g., that the insured

²⁶ Rostkowski M. Op. cit. P. 1019.

supports the beneficiary. If insurable interest in life is based upon familial relationship, the law usually places no limit upon the monetary value of insurance that may be obtained.

Insurable Interest in the Life of a Business Partner

Business relationship may also confer insurable interest in another's life. For e.g., a creditor has an insurable interest in his or her debtor's life. Partners have insurable interest in each other's lives. If insurable interest is however, based on commercial relationship, the insurance obtained may not greatly exceed the value of the interest.²⁷

Two important issues call for determination by the courts in cases involving insurable interest in life:

- i. Who is entitled to challenge the beneficiary's lack of interest, and
- ii. When insurable interest must exist in life insurance policy.

These two issues were given a thorough consideration in the case of *Secor v. Pioneer Foundry Company*.²⁸ In the case, Jack Secor was employed by the defendant company from 1954 to 1963. In 1960 the defendant company took up a \$50,000 "Keyman" insurance policy on Secor's life. The defendant company was the applicant, owner and beneficiary of the policy and paid premiums. Jack Secor's employment relationship was terminated in July 1963 but the company still paid the March, 1964 annual premiums. Jack Secor died in April, 1964 and the insurer paid the proceeds of the policy to the defendant company where upon the Plaintiff who was the wife of the deceased challenged the payment arguing that

²⁷ Roszkowski M. *ibid.* at P. 1021.

²⁸ (Michign App. 1970).

after the termination of Secor's employment the defendant company lost whatever insurable interest it had in Secor's life. She lost both at the court of first instance and on appeal.

The court held on appeal that it is only the insurer that may assert that the beneficiary of a life policy has no insurable interest. Moreover, the court held further that the purchaser of ordinary life insurance, as distinguished from casualty or property insurance buys not only indemnification in a specific amount against a particular peril or potential loss but also makes an investment. The court thus reasoned that to terminate the rights of the owner or beneficiary of ordinary life insurance because the relationship to the life insured has changed would adversely affect this investment quality of life insurance as well as confer an unanticipated and unwarranted windfall on the insurer.

This case, therefore, serves as a good authority for the general rule of law that if the insurable interest requirement is satisfied at the time the policy is issued, the proceeds must be paid upon death of the life insured without regard to whether the beneficiary has an insurable interest at the time of death.

The Principle of Indemnity Considered in Relation to the Concept of Insurable Interest

As early stated in the introductory part of this article, the rule of indemnity is aimed at restoring the insured, who has suffered a loss within the contemplation of the parties, to the financial position which he occupied before the loss, in relation to the subject matter. The whole idea of insurance is to prevent the individual or any group from suffering much greater economic impoverishment through material losses. Sometimes, however, to determine the insured financial position which he

occupied before the loss creates acrimonious ramblings between the insurer and the insured.²⁹

Under the indemnity principle, the benefit conferred by the insurer may not exceed the loss suffered by the insured. In other words, an insured should not be able to realize a net-profit through insurance. That it is against public interest to allow such a laudable economic device meant to prevent loss to be used as an avenue of making profits. Section 62 of Insurance Act, 2004 places a limitation on amount receivable by a person with insurable interest.

The Section Provides:

Subject to the provisions of any other written law or enactment, where a person has an insurable interest in the life or event insured, he shall not be entitled to receive from the insurer an amount greater than that of the value of the interest of the insured in such life or other event.

The law recognizes two reasons for this approach:

First, the possibility of profit through insurance is an inducement to use insurance as a gambling device. Secondly, the prospect of profit may provide inducement to destroy intentionally the insured life or property. It is also to prevent the above-mentioned practices that the concept of insurable interest earlier discussed is aimed at. This, therefore, serves as the meeting point between the concept of insurable interest and the principle of indemnity. They are both designed to sanitize and to prevent unethical practices in the insurance industry.

29 *Leopard v. Excess Insurance Co. Ltd* (1979) All E.R. 668.

In motor insurance policy, for instance, it is the current value of the car in the market immediately before the accident occurs that becomes the subject matter of claim. The measure of indemnity will depend on the condition of the car or its depreciation in value.³⁰ Thus, a person who purchased coverage in excess of the value of the subject matter will not collect more than the actual loss suffered. But the principle of indemnity does not prevent a person from insuring less than the amount of the subject matter insured.

Here again, this writer is of the opinion that there is need for the insurer to educate the insuring public on the principle of indemnity with a view to preventing undue enrichment of the insurer by the insured. It has been suggested, that the insurer must play an educative role by discouraging the proposer from entering into more than one insurance on the same subject matter, except life.³¹ This is because in the event of a loss the doctrine of contribution prevents the insured from being indemnified by all the insurance companies involved.

On the other hand, the insuring public is advised to pay more attention and to give genuine answers to questions contained in the proposal form aimed at eliciting information of any other insurance entered into by the insured. The truth of any such statement is made the basis of the contract.³² The contract clause instills on the proposer the necessity to tell the truth, but the legal implication of this clause is hardly understood by the generality of the insuring public. Thus, the insured very often evades giving genuine answers to questions put to prevent him from entering into multiple contracts with different insurers on the same subject matter.

30 *Okence v. Royak Exchange Assurance* (1958) WRNLR. 185.

31 *Yerokun, O. Op. Cit.*, P. 202.

32 *Dawson Ltd v. Bonin* (1922) A.C.412.

Again, to facilitate the process of his being indemnified after a loss, the insured is advised to comply strictly with recovery procedures outlined in the policy. Both life and property insurance policies explicitly outline appropriate procedures for filing a claim to recover for a covered loss. Failure to abide by these procedures will deny the insured his right of being indemnified. But once a claim is properly filed, the insurer is under a duty of good faith and fair dealing to evaluate, process and pay the insured. It is hoped that compliance with the above observations will make things easier for the insured to recover his proceeds after a loss and at the same time curtail the insurer's tendency to evade his just obligations to the insured through the manipulation of the concept of insurable interest and the principle of indemnity.

Recommendations

The concept of insurable interest and the principle of indemnity have deep-rooted legal effects on the insuring public. It is therefore, recommended in this article that the insurer be made to give some level of education to the insured in these areas for the following reasons:

- i) Insurable interest and principle of indemnity are central to insurance contract. Without insurable interest, the contract of insurance is null and void. While the insurer knows this, the insured most times is unaware of this fact. It is recommended that the law should place responsibility on the insurer to enlighten the insured on these principles.
- ii) The insured can only be indemnified the actual loss suffered. There is therefore, need to educate him on the fact that the purchase of insurance coverage in excess of the value

of the subject matter insured does not entitle him to excess indemnity. Once again the law should make it a point of duty for the insurer to explain this fact to the insured.

- iii) Since the interplay of these two principles is aimed at checkmating the unethical practices the insured might want to indulge in, it is recommended that care should also be taken to ensure that they do not become negative tools in the hands of the insurer who may equally use them to evade a just obligation.
- iv) It is also recommended that both parties to insurance contract be encouraged to be open to each other rather than trying to conceal vital information from the other since this practice can diminish public confidence in insurance business.

Conclusion

This paper has attempted to explain the general meaning of insurance, how it is practised and the problems associated with insurance industry. The paper has examined the interplay of the concept of insurable interest and the principle of indemnity and concludes that the two are central to contract of insurance and therefore, no party to a contract of insurance should be allowed to use them negatively.

Finally, the need to enlighten the insured on these vital aspects of insurance law is stressed. The insurer who in most cases is more enlightened be made to educate the insured. This will help to make the minds of the parties to insurance contract work *ad idem*.

Chapter Fourteen



The Imperative of Democratic Governance in Nigeria

Shishi John M.

Introduction

"Democracy is the worst possible form of government except all the others that have been tried."¹

Democracy is so often discussed that the expression is to be found in the rhetoric of national politics everywhere, in language of international diplomacy, in the jargons of several professions and academic disciplines.²

All governments claim to be democratic and critics of government always accuse those in power of being undemocratic. People all over the world now seem to agree that democracy is the best form of government and that real democracy will offer a ready solution to all the political and social ills of the nation.³ Prior to and after 1st October 1960 when Nigeria got

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1 The Encyclopedia Americana (Danbury: Americana corporation International Headquarters 1978) Inter. Ed. P. 690.

2 Yemi Osinbajo & Awa Kalu, Democracy and the Law (Lagos: federal Ministry of Justice 1991) 32.

3 Ibid.

her independence, there have being concerted efforts by nationalist leaders and various governments of the country to attain democracy.

The desire for democracy in Nigeria was reflected in Nigerian Constitutions of 1960, 1963, 1979 and particularly the preamble to the 1999 constitution which provides inter alia as follows:

To provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice and for the purpose of consolidating the unity of our people.

The above dream can only be realized in a democracy. Freedom, Equality and Justice are concepts which hardly flourish and blossom in a dictatorship or in an oligarchy or even in a monarchy.⁴

The Nigerian aspiration to democratic governance was articulated in the provision of S.14 (1) of the 1999 constitution, which provides that; "The Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice".

The 1979 constitution was experimented by the civilian administration of President Alhaji Shehu Shagari who was overthrown by the Buhari/Idiagbon regime in 1983. Then the country came under the dribbling leadership of military dictatorships running through the regime of General Ibrahim Babangida, General Sani Abacha and General Abdulsalami Abubakar who fashioned the 1999 constitution and handed

4 Ibid at 38.

over power to the present Civilian Government of President Olusegun Obasanjo on May 29th 1999.

These developments in Nigeria expose the desperate desire of our leaders to rule the country according to this model global political system- democracy. What then is democracy? And what are the challenges facing this “magic” concept of government?

To answer these questions, we shall consider the meaning of the key words and the meaning of democracy with a brief touch on its origin in this paper. We shall also examine the attributes of democracy and look at the general and peculiar problems of democracy in Nigeria.

The Meaning of the Key Words

Before considering the origin and the meaning of democracy in general and in the context it is discussed herein, it is pertinent to define the key words of the topic, that is, challenge, governance and democratic.

Webster's dictionary of the English language defines “challenge” inter-alia as “question the truth or rightness of.”⁵

Democratic means pertaining to democracy or a democracy. Tending to level social distinctions: practising social equality...⁶

Governance on the other hand, means manner or system of government or regulation.⁷

5 Deluxe Edition (Newyork: P.M.C. publishing Company, Inc).

6 Ibid.

7 Ibid.

The Origin of Democracy

Democracy is a word that comes from two Greek roots, *demos*-the populace and *kratia*-rule, taken together, rule by the people.⁸ The Greeks used the term to describe the Government of *hens* and other Greek city-states that flourished in the fifth century B.C.⁹ In his famous funeral oration, Pericles of Athens "One of the greatest democratic statesman of all times"¹⁰ declared that "our constitution is named a democracy because it is in the hands not of few but of the many".¹¹

Pericles thus laid the philosophical foundation and the conceptual infrastructure of and for Athenian democracy in particular and democracy in general.¹²

In the Athenian city state or *polis*, final authority resided in the assembly which was a large body, composed of all male citizens which met regularly to debate public issues in the central public square or *agora*.¹³

Democracy as practised by the Greeks was direct participatory democracy and not representative or other indirect forms of democracy. It is apparent that this narrow perception of democracy falls short of modern social and economic realities of world politics. First, the large population of most countries today (e.g., United States of America and Nigeria) make direct democracy as was practised in Athens to be infeasible.¹⁴

8 Milton C. Cummings Jr and David Wise, *Democracy under pressure* (New York: Harcourt Brace Jovanovich inc. 1974) 2nd ed. Pg. 19.

9 *Ibid.*

10 Osinbajo and Kalu, *op. cit* at 33.

11 *Op.cit.*

12 *Op. cit.*

13 *Op. cit.*

14 *The Encyclopedia Americana* (*supra*) pp. 684-685.

Secondly, delegation of authority is inescapable in any political assemblage unless all citizens are in continuous service at all times not only legislating but executing the laws together.¹⁵

Basic to modern democracy is the notion of restraint upon government powers. In a modern democracy, the powers of the government are specifically circumscribed by means of a single written constitution as in Nigeria or by series of organic laws and conventions like in Britain.¹⁶ The 1960 constitution of Nigeria is the first legislation that contains provisions for the principles of democracy in Nigeria.¹⁷ All subsequent Nigerian constitutions – 1963, 1979, and 1999 contain provisions for democratic governance in Nigeria.

The Meaning of Democracy

Democracy like all other concepts in the field of social sciences and humanities is devoid of an acceptable meaning. This is because of the various ways the concept is perceived and used.

The term democracy is however defined in the Blacks Law Dictionary¹⁸ as;

that form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation as distinguished from monarchy, aristocracy or oligarchy.

This definition is too sweeping as it does not prescribe or define the system of representation through which the people exercise

15 Ibid.

16 Supra note 2 at 43.

17 sec SS. 17-31 of the Constitution.

18 Black, Henry Campbell M.A. (St Paul, west publishing Co. 1990) 6th Ed.

their sovereign power. Would a system of representation by nomination and selection, which may satisfy the above definition, qualify a polity where this is practised as democratic?

The popular definition of democracy is that it is "the government of the people by the people for the people."¹⁹ This definition also according to this writer has given a gloomy picture of what democracy is. Firstly, it does not define the people (whether the minority or majority). Secondly it does not specify the *modus operandi* by which this government is run.

For E.E Schattschneider, democracy is a competitive political system in which competing leaders and organizations define the alternatives of public policy in such a way that the public can participate in the decision making process.²⁰ In this definition, emphasis is laid more on the leaders than the people. Moreover, the ways the alternative of public policy are defined is not determined. Apart from the failure of the definition to define the public (minority or majority) that would participate in the decision making process and the level of their participation is not also prescribed.

In the encyclopedia Americana²¹ democracy is viewed as;

a form of government in which the major decisions of government or the direction of policy behind these decisions rest directly or indirectly on the freely given consent of the majority of the adults governed.

This definition although appears more comprehensive than the others considered, is inadequate in the fact that it has no

19 Oluyede P.A.O, Constitutional Law in Nigeria (Ibadan: Evans Brothers (Nigeria Publishers) Limited 1992) 1st Ed. At 15

20 Quoted by Yemi Osinbajo & Awa kalu, Note 2 (supra) at 3-4

21 Supra p. 684.

provision for how the free consent of the majority of the adults is given. Would it be by election or selection?

The last two definitions of democracy represent the socialist and the capitalist perception of democracy respectively. While the later emphasizes as political freedom but does not emphasize economic justice,²² the former emphasizes the ability of the leaders to make policies to guarantee and provide the economic security for the people, without according the people wide political freedom.

All said and done, it will be naïve for us to shy away from proffering a working definition of democracy for the purpose of this paper.

Democracy could be defined as a form of government in which major decisions of government or the direction of the policy behind these decisions are made directly or indirectly through elections at definite intervals by the freely given consent of the majority of the adult governed.

Freely Given Consent

The phrase freely given consent entails that the individual electorate should exercise his free will of choice through free and fair elections without any external influence whatsoever. The implication of the presence of freely given consent call attention to the difference between ancient democracies which stressed only majority rule as a validating principle and modern democracies which since the birth of the American republic have stressed the operating presence of inalienable rights.²³

22 Op. cit p.4.

23 Op. cit.

Conditions under which it could be inferred that there is freely given consent in a polity are: When there is no physical coercion or threat of coercion employed against the expression of opinions; when there is no arbitrary restriction placed on freedom of speech, press or assembly; where there is no monopoly of propaganda by the ruling party; and where there is no institutional control over the instrument or facilities of communication.²⁴ These are the minimal conditions and in their absence a plebiscite even if unanimous is not democratically valid.²⁵

Direct and Indirect Democracy

There has been a misconception that “the only genuine democracy is direct democracy in which all the citizens of a community are present and collectively pass on all legislation as was practised in Ancient Athens...”²⁶

This distinction breaks down because literally construed; there can be no direct democracy if laws are defined not only in terms of their adoption but also in terms of their execution. Moreso delegation of authority is inescapable in any political assemblage.²⁷

Majority Rule

This entails that “there must be an understanding that when the enfranchised members of the community disagree as to what ought to be done...the majority of the electorate and not the minority should carry the day.”²⁸ This view became

24 Ibid p. 685.

25 Ibid.

26 Op. cit p. 684.

27 Ibid.

28 Yemi Osinbajo & Awa Kalu (supra) pp. 4-5.

insufficient with the emergence of a theory of human rights beginning in the 17th century and its explicit development in the writings of Thomas Hobbes and above all John Locke.²⁹ The two authors maintain that "majority could do every thing except deprive minorities of the freedoms of speech, press, assembly, rights to fair trial and so on – the exercise of which might enable the minority peacefully to win over the electorate and come to power. Minorities might do everything within the context of these human rights to present their case."³⁰

Free and Fair Election

Elections lie at the heart of the democratic process; and it is through the act of voting that government by consent is secured. It is therefore expected that the votes of citizens will carry equal weight and values depending on how the constituencies are delimited or apportioned³¹ and how the elections are organised.

The above calls for a free and fair election which in the best of circumstance as asserted by Dr. Epiphany Azinge is extremely difficult even for political scientists to define.³² In "Elections without choice" the authors make the assertion that free fair and competitive election is supposed to contain inter alia the following essential elements: competition between political parties or candidates contesting election and freedom of the voters.³³

29 Op.cit. p 685.

30 Ibid.

31 Yemi Osinbajo and Awa Kalu op.cit pl 24 relying on the decision in *Baker v. carr* 369, us (1962).

32 Ibid.

33 Ibid p.25.

This freedom entails the voter's right:

- a. To have this franchise recognised through registration.
- b. To vote without being segregated into categories dividing the electorate and revoking the plea of popular sovereignty.
- c. To cast his ballot free from external hindrance and in secret.
- d. To decide how to vote, even to spoil his ballot without external pressure.
- e. To expect his ballot to be counted accurately even if it goes against the wishes of those in power.³⁴

According to professor Mackenzie,³⁵ the following conditions must exist to have free and fair elections;

- a. Independent judiciary to interpret the law.
- b. An honest, nonpartisan administration to run the elections.
- c. A developed system of political parties, well enough organised to put their policies, traditions and teams of candidates before the electors as alternatives between which to choose;
- d. A general acceptance throughout the political community of certain rather vague rules of the game, which limit the struggle for power because of some unspoken sentiment that if the rules are not observed more or less faithfully, the game itself, will disappear amid the wreckage of the whole system.

It is difficult or even impossible to achieve rational freedom in practice as organised force and money, which can be spent freely, influence every social act involving a society. Moreso

³⁴ Ibid.

³⁵ Ibid p.26.

elections are not free if those in power manipulate them so as to perpetuate their own power.

Conditions for Democracy

The crucial questions to be answered in appraising democracy are not where is it, and where it is not? But where democracy is the professed aim and idea, how broad and deep is it? And upon what issues is it really operative.³⁶ Cohen identified five kinds of conditions of democracy.

These are:

- i. The material conditions of democracy.
 - ii. The constitutional conditions of democracy.
 - iii. The intellectual condition of democracy.
 - iv. The psychological conditions of democracy.
 - v. The protective conditions of democracy.³⁷
- i. ***The material conditions of democracy:*** These have to do with environmental (The topographical and climatic conditions to democracy), the mechanical (getting participatory materials including ballot boxes, filing cabinets, cars, offices, stationery etc.) while the economical condition has to do with some level of well being of the citizens to enable meaningful participation in the process.
 - ii. ***The constitutional conditions of democracy:*** This include political freedom and freedom of speech, press, movement, equal opportunities to participate in decision making, separation of powers and constitutional supremacy to limit the power of the government.

36 C. Cohen, Democracy quoted by H.S. Galadima, *Understanding Politics* (Jos: Plateau Publishing Company Ltd 1995) 1st ed. pp52-53.

37 Ibid.

- iii. ***Intellectual conditions include:*** The provision of information, education of the citizens and the development of the arts of conferral.
- iv. ***The psychological conditions*** consists of complex dispositions and attitudes that must be manifested by the individual members of the community if democracy is to function. These are the openness, tolerance, democratic spirit (i.e., obedience to law and respect for constituted authority) willingness to compromise and self-restraint when holding power.
- v. ***The protective*** have to do with the defence of democracy against coups subversion and intervention internally and externally.

It is believed that the social conditions of democracy should be added to this list as the sixth condition. The social conditions include religious ethnic, linguistic and cultural setting of the society.

These conditions for democracy are generally provided for under chapter II and IV of the 1999 constitution of the Federal republic of Nigeria The favourable disposition of the above stated conditions in a polity determines the depth of its democracy.

Criteria for the Determination of Democracy

Howard Zinn in considering how democratic America is itemised a series of criteria which he rightly pointed out, "go beyond formal political institution, to the quality of life in the society; beyond majority rule to concern for minorities, and beyond national boundaries to global view of what is meant by 'The people'" in that rough but correct view of democracy as government of, by and for the people. These criteria are:³⁸

38 See in particular Howard Zinn, How Democratic is America? In Robert A. Goldwin ed, How democrat is America? In Yemi Osinbajo &Kalu (supra) p. 27.

1. To what extent can various people in the society participate in those decision, which affect their lives – decisions in the political process, and decision in the economic structure.
2. As a corollary to the above: do people have equal access to the information, which they need to make important decision?
3. Are the members of the society equally protected on matters of life and death in the most literal sense of that phrase?
4. Is there equality before the law: police, courts with the law-enforcing institutions, so as to safeguard everyone's personal freedom interference by others, and by the government equally?
5. Is there equality in the distribution of available resources, those economic goods necessary for health, life, recreation, leisure growth?
6. Is there equal access to education, to knowledge and training, so as to enable persons in the society to live their lives as fully as possible to enlarge their range of possibilities?
7. Is there freedom of expression on all matters, and equally for all to communicate with other members of the society?
8. Is there freedom for individuality in private life, in sexual relations, family relations, the right to privacy?
9. To minimise regulations: do education and the culture in general foster a spirit of cooperation and unity to sustain the above conditions.
10. As a final safety feature: Is there opportunity to protest, to disobey the laws, when the foregoing objective is being lost as a way of restoring them?

Though Howard Zinn referred to the 10th criterion as the safety feature, it is of the opinion that the following should also be added to the list of criteria for the determination of how democratic a country is.

11. How continuous and uninterrupted is the democratic rule of the country.³⁹
12. To what extent have elections being fair and free and competitive.⁴⁰
13. To what extent is the constitution of the country supreme? Is it the act of people?
14. To what extent are the values of tolerance, pragmatism, cooperation and compromise upheld in the country?
15. To what extent are the leaders accountable, transparent and responsible in the performance of their functions?

The list for criteria can never be exhausted however it is needless to say that no country in the world can lay claims to complying with these criteria enumerated above in its practice of democracy⁴¹ in Nigeria, these criteria are encapsulated in chapter II and IV of the 1999 constitution of the Federal Republic of Nigeria as fundamental objectives and directive principles of state policy and Fundamental Human Rights respectively.

Nigerian Democratic Experience

Nigeria has gone through the 1960, 1963, 1979, and the 1999 constitution. Apart from the 1960 constitution, the subsequent constitutions have provisions entrenching therein the principles

39 Ibid p. 26.

40 See generally professor Ben Nwabuzé's discourse on this in Yemi Osinbajo and Awa Kulu Ibid pp.66-67.

41 Ibid p. 23.

of democracy.⁴² For illustration, the 1999 constitution provides for its supremacy,⁴³ separation and division of powers,⁴⁴ fundamental objectives and directive principles of state policy⁴⁵ sovereignty of the people⁴⁶ fundamental rights⁴⁷ judicial independence⁴⁸ and electoral process.⁴⁹

The fundamental rights provided under the 1999 constitutions are right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and the press, right to peaceful assembly and associations, right to freedom of movement, right to freedom and discrimination, right to own property, right to compensation for property compulsorily acquired. These constitute the bedrock of democracy.

We do not intend to discuss the efficacy or otherwise of these provisions as the incessant intervention of the military in politics and the challenges to democracy discussed later are of how weak the Nigerian is.⁵⁰

The 1979 and 1999 constitutions are autochthonous constitutions⁵¹ but we are still struggling to achieve democratic rule today. Though according to Alhassan Idoko (the former Honourable

42 See the preamble to the 1999 constitution and section 14 (1) and (2) of same.

43 S.I.

44 Ss 4-6, also chapters v-vii.

45 Ss. 13-22 i.e. chapter II.

46 S. 14 (2) (a) .

47 Chapter IV ss. 33-46.

48 6 (6) (b).

49 Ss. 65-79; 106-119; 132-134 & 142; 177-179, 187 & 285 and other provisions on the electoral process in the constitution while the third schedule to the constitution established the federal and state Electoral Commissions.

50 Oyabauire S.E Democratic Experiment in Nigeria Interpretive ssays (Benin, Omega Publishers Ltd 1987) P.7.

51 A constitution is said to be autochthonous if it derive its authority, force and validity from "its own native authority" or people.

Chief Judge of Benue State) the democratic apparatus on the ground were not necessarily bad or was the constitutional foundation deficient but, the players were thoroughly and wholly lacking in empirical principles to depend upon other than resorting to tribal, regional and emotional appeals.⁵² He further went on that no constitution of any country is perfect however wisely drawn as there would be occasions to amend it. He posited that we are a nation making constitution after constitution, not amending constitution we suspend and start all over only to bring in almost all we have suspended. This means there must be something wrong with our polity making it unconducive for democracy to flourish. We shall at this juncture examine what is wrong with our polity that is posing a threat to democratic governance in Nigeria.

The Challenges of Democratic Governance

Prof. Nnamdi Aduba in a paper titled Human Rights and Social Justice in Nigeria: issues Dilemma and options listed the following as the issues confronting the realisation of human rights or social justice in Nigeria; (1) illiteracy, (2) poverty, (3) lack of sufficient legal aid, (4) lack of basic infrastructure (5) unemployment (6) lack of physical security (7) independence of the judiciary and (8) attitude of some state functionaries.⁵³

These issues are no doubt also impeding the realisation of democratic government in Nigeria as freedom and equality are the basic tenents of democracy. Apart from expatiating on these issues that impede the realisation of democratic

52 Ayua I.A, *Law Justice and the Nigeria Society* (Lagos Insitute of Advanced Legal Studies 1995) p. 145.

53 Awa Kalu & Yemi Osinbajo Op. Cit. p. 228-233.

governance in Nigeria. There are constitutional and statutory inhibitions, inordinate delays in the dispensation of justice in Nigeria; military intervention in politics, corruption and other social vices; and disobedience to the rules of the game.

The list can never be exhaustive but a consideration of the above will give us an insight to the enormity of the challenge the Nigerian democracy faces.

Illiteracy

There is a standing presumption that democracy takes root and survives where levels of economic development and education are high.⁵⁴ The foremost positive condition that its presence quickens and strengthens the democratic process is the spread of education, which allows for an informed and critical awareness of the issues and problems of the times. The informed and better educated the electorate, the healthier is the democracy.⁵⁵ The freedom of thought, conscience, freedom of assembly and association and in fact, most of the other freedom would have little meaning except in the context of freedom of expression and press.

According to Prof. Aduba, all the above benefits are lost because majority of Nigerians can neither read nor write due to illiteracy. With the loss of their freedom of expression goes also their right to participate meaningfully in government.⁵⁶

54 John F. Helliwell "Linkages between Democracy and economic growth": *British Journal of Political Science* (Cambridge University Press 1994) vol. 24, pt 2 p. 225.

55 *The Encyclopaedia Americana* (supra) at 685.

56 Awa akalu & Yemi Osinbajo op. cit p. 228 229.

Poverty

"The effects of income on democracy are found to be robust and positive."⁵⁷ Late Chief Obafemi Awolowo observed poverty as having the following characteristics viz: inability of one to have the means to satisfy the necessities of life, undernourishment or malnutrition, wretched and degrading shelter; shabby clothing and lack of any kind of luxury.⁵⁸ It is very difficult to claim that majority of our people cannot be categorized as poor.

According to Justice Niki Tobi, "if the cost of litigation is beyond the reach of the ordinary citizen then the constitutional right of access to court is denied him for the right becomes by fact of his poverty valueless."⁵⁹

This writer is in agreement with the learned Justice on this point, it is added that not only would the right of access to the court be a mirage but, the practical realisation of the fundamental rights would be elusive in a country like ours where millions are living below starvation.⁶⁰ Even with the establishment of the National Poverty Eradication Programme (NAPEP) and its activities aimed at eradicating poverty, it shall remain a great challenge to Nigerian democracy.⁶¹

57 John F. Helliwel op. Cit.

58 Awolowo O. path to Nigeria Greatness referred to by nnamdi Aduba in Awa Kalu and Yemi Osinbajo Op. Cit.

59 Ayua I.A. (supar) p. 135.

60 See generally Namdi Aduba's article on Human Rights and social justice in Nigeria Issues Dilemma and options in Awa Kalu & Yemi Osinbajo op. cit 229-230.

61 Thisday Newspaper of Thursday February 24, 2011, P.40.

Lack of Sufficient Legal Aid

The activities of the Nigeria legal aid council are so unpronounced that even some educated people in Nigeria are not aware of its existence. The setting up of the National Orientation Agency (NOA) to improve on this has not yielded the desired result. If Justice is to be done to the majority of our people who are poor in the country that has adopted the accusatorial system of adjudication, an effective legal aid is necessary for the citizens.

Lack of Basic Infrastructure

Infrastructure include the following: availability of good roads, health care delivery, water, electricity, efficient communication system and all other material conditions that would enhance the exercise of the fundamental rights by the citizens. It is common knowledge that these facilities are insufficiently provided to the majority of Nigerian populace. Thus their right to life, movement, expression and association are adversely affected.

Unemployment

The dignity of the human person is not enhanced where able bodied citizens are unemployed. Dr. Akinola Aguda commented on the relationship of unemployment to this right as follows:

Can we imagine a greater torture for able man or woman than to wake up in the morning and not have the smallest clue as to how or where he is going to find a meal to eat the whole of that day not to talk of the day after? I take it as most inhuman and degrading for an able bodied man and woman willing and able to work to find himself or herself a victim of unabated and frustrated prolonged unemployment. Such a situ-

*ation leads progressively from optimism to pessimism and from pessimism to fatalism accompanied by a dreadful feeling of insecurity or complete economic helplessness and failure. When that stage of economic helplessness and failure is reached that surely must be a state of torture.*⁶²

The above description of the effect of poverty on one's life is apt for the topic being discussed.

Lack of Physical Security

"Democracy" is posited on freedom. True democracy is conceived when people feel safe and unhampered to freely choose the government and leaders of their choice to rule them.⁶³ When people feel threatened and endangered they cannot be free, and without freedom whatever contraption invented cannot be called democracy.⁶⁴ Violence is very prevalent in our society today. There has been violent attacks on the following people resulting to their death, Alfred Rawane, Chief Mrs Kudirat Abiola, Professor Bandipo of A.B.U Zaria, Alh. Gubio – The ANPP Governorship candidate of Borno State, Aondowase Angu, Associate Prof. Gabriel Jande, to mention a few.

The Nigerian Media is replete with reports of violence all over the country. On the 23rd of February 2011, the Nation Newspaper published an editorial opinion on what is tagged "Benue Tragedy." Reporting the recent attack on some communities in Gwer-west Local Government Area of Benue State by suspected Fulani herdsmen and some mercenaries believed to have come from Chad, who roused the people from their

⁶³ See the editorial of A newsletter of Catholic Secretariat of Nigeria Vol.1 No. 1 June 1996 P.2.

⁶⁴ Ibid.

sleep with gun shots into the air, only to fire at them as they ran out in confusion. There have also been cases of violence perpetrated against the police. Under this situation, freedom of movement and the right to personal liberty cannot be enhanced.

Independence of the Judiciary

It has often been said that the judiciary is the last hope of the common man, and such, it is of paramount importance that it should be independent not only of the legislative and executive arms of government but also of external influences. The general scheme of the Nigerian constitutions is to guarantee this independence by power separation and division among the three arms of government, Legislature, Executive and the Judiciary. Even then, the three arms of government are independent only in terms of existence and personnel,⁶⁵ it is only an independent and courageous judiciary that can maintain the rule of law. The Supreme Court per Justice Obaseki J.S.C observed that:

The rule of law means that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of the executive. This is the position in this country where the judiciary has been made independent of the executive by the constitution of the Federal Republic of Nigeria 1979 as amended by Decree No. 1 of 1984 and No. 17 1985.

It is important not only that a judge should in fact be impartial and true to his trust in every particular; it is equally important

65 Ibid. See *Military Government of Lagos State v. Chief Ojukwu*.

that he should be thought to be impartial and above political or other influences of every name, nature and description.

This means that the tenure of judges should not be at the pleasure of the government. It also means that their remuneration should be guaranteed and that they must be self accounting.⁶⁶ Moreover the procedure for their removal should guarantee fair hearing and must be observed religiously.

Hon. Justice Idoko observed that the principle of the independence of the judiciary has been limited to independence of the mind and the work because the judiciary has been stripped of fund. He went further that the helmsmen of the various judiciaries – federal and state – have almost been transformed into craven lackeys of the executive with cap in hand to beg for fund that the judiciaries of necessity need.⁶⁷ In any running of government system he posited the one who has financial power has the whip in hand. He can squeeze you out of existence or enervate you or make you important or drain you of steam.⁶⁸ Certain factors are mentioned by I.A. Agbede⁶⁹ as inhibiting the independence of the judiciary.

1. First he said in a situation where judges are poorly paid, the judiciary may not be able to attract men of ability and competence. Besides the desire to make ends meet may tempt men of lesser abilities to succumb to gratification for the performance of their judicial functions.
2. Second he went on to say that men who have no confidence in their own ability are likely to dance to the tune of the government to the detriment of the common man they

66 Jomo. M.A and Bolaji Owasanoye; *Individual Right under the 1989 Constitution* (Lagos: Nigeria Institute of Advance Legal Studies 1993) P.37.

67 Ayua I.A. *op.cit.*149.

68 *Ibid.*

69 See generally M.A. Ajomo and Bolaji Owasanoyo *op.cit.* pp.37-39.

are being called upon to protect in the particular situation. Lack of confidence is brought about by the poor condition under which our judges live and work.

3. Third the disparity, both in remuneration and social standing between judges of high court on the one hand and those of the appellate courts on the other, has had unsavoury effect of making some of our high court judges promotion conscious and tend to be more "executive minded" than the executive itself.
4. Forth the judiciary relies on the executive for her security and enforcement of orders. This is inimical to judicial independence. None could have thought in his widest imagination that the police could embark on victimizing judges for giving decisions unfavourable to them until judges were having their police "orderlies" withdrawn for such reasons.
5. Above all, he posited that if there is no one thing that judges need more than anything else, not only for the sustenance of judicial integrity but also for the survival of the legal system itself, it is necessary for the court to attract an appreciable if not a total degree of public confidence.

The creation of the National Judicial Council has addressed some of the above factors inhibiting the independence of the judiciary, however the sustenance of judicial integrity to boost public confidence in the sector remains a great concern. In the recent past, a controversy over the purported recommendation for the appointment of the president of the court of appeal Hon. Justice Ayo Salami to the Supreme Court by the Chief Justice of Nigeria, Hon. Justice Aloysius Katsina Alu has generated enough public attention and commentary that the Nigerian Bar Association set up a panel to probe "The Katsina-Alu,

Salami face-off: Debilitating corruption eating into and corroding the entire judicial system etc.”⁷⁰

Justice Alhassan Idoko sums up the issue in the following words: “There can be no enjoyment of liberties without an adequately funded, protected and independent judiciary.” The Nigerian judiciary has been a subject of gossip and innuendos for quite some time; some not without justification, but many are of deliberate falsehood.⁷¹

Attitude of Some State Functionaries

It is common knowledge that in spite of the fundamental human rights provisions in our constitutions, the police detain people for long periods without trials. These people are most times detained under inhuman conditions. They are tortured and handcuffed even when they look weak and unhealthy. Everyday of our nationhood, we hear of unexplained detentions, assassinations, executions, intimidations, blackmails and wanton violation of rights by law enforcement agents.

Prof. Nnamdi Aduba focusing on the second republic exposed the assault on the citizens by the law enforcement agents in the following words: courts orders were disregarded by them with impunity; pressmen were harassed and intimidated. The officials of the department of Customs and Excise were “raiding” markets with gun, horse-whips and tear gases for the seizure of banned imported items when it was due to their inability to check the menace of smugglers that led to the presence of the banned imported items in the first place.⁷²

70 The Nation Newspaper, Wednesday February 23 2011 P.5.

71 Ayua I.A. op.cit. 147-148.

72 Awa Kalu & Yemi Osinbajo op.cit p.233.

The Attorney Generals or officers in the Ministries of Justice spread across the country do not help matters as cases are delayed and people continue to be detained to await legal advice from the ministries. These no doubt undermine the realisation of fundamental rights and consequently democracy.

Constitutional and Statutory Inhibition

The 1999 constitution as amended contains ouster clauses, which could inhibit the free flow of democracy. First, judicial powers of the court do not extend to the observance of the fundamental objectives and directive principles of state policy provided in chapter II of the constitution.⁷³

Secondly, the judicial powers will not extend to any action or proceedings relating to any existing law made on or after 15th January 1966 for determining any issue or question as to the competence of any authority or person to make such law.⁷⁴

Thirdly the constitution also provides that no civil or criminal proceeding will be instituted or continued against the person holding the office of President, Vice President, Governor or Deputy Governor.⁷⁵ He cannot be arrested or imprisoned during the period he is in office or required or compelled to appear in any court of law. The above immunity will however not apply to civil proceedings against the person in his official capacity or to civil and criminal proceedings in which such a person is only a nominal party. Furthermore, section 45 of the 1999 constitution provides that:

73 S.6(6) (c) of 1999 Constitution.

74 S.6(6) d of 1999 Constitution.

75 S.308 (1) a & (3).

Nothing in sections 37,38,39,40, and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society;

- a) In the interest of defence, public safety, public morality or public health: or
- b) For the purpose of protecting the rights and freedom of other persons.

It is submitted that under the guise of a certain law been “reasonably justifiable in a democratic society” an erratic legislature may in order to score a cheap political advantage or for some other ignoble cause initiate laws that may have the effect of whittling down these guaranteed rights.

Other statutes also have some inhibition, for the institution of civil proceedings against public officers for offences (which include human rights violation) committed in the course of their employment; except such action is instituted within 3 months from the date of the commission of the act complained about.⁷⁶

Military Intervention in Politics

Military rule is antithesis to democracy. It comes with the suspension and modification of the constitution and the introduction of rule by decrees most of which oust the jurisdiction of the court to enquire into the validity of these decrees. The following is a typical example of ouster clauses in Decrees:

⁷⁶ S.2 of the public officers protections law.

No question as to the validity of this Decrees or any other Decree, made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria.⁷⁷

This affects the independence of the judiciary in the dispensation of justice and therefore undermines the development of democracy. The undemocratic use of the power of incumbency to win elections at all cost in Nigeria today is traced to the long period of military intervention in the polity. Also linked to the military influence in Nigeria's democratic system is the culture of political violence and intolerance of opposition. Evidence of intolerance and intimidation in Kwara State were reported in *The Nation*⁷⁸ as follows:

The latest yesterday through to this morning, was the wanton destruction of all the bill boards belonging to the opposition in the state capital. To underscore their barbaric acts and where they are coming from, these thugs destroyed everything and left only bill boards belonging to the PDP governorship candidate; Abdulfatah Ahmed.

Reporting, further on the level of political intimidation in Kwara State in the page, *The Nation* has this to say:

The Democratic People's Party (DPP) and Allied Congress Party of Nigeria (ACPN) in Kwara State have accused the ruling Peoples Democratic Party (PDP) of intimidation.

77 The nation Newspaper, Wednesday 23 Feb. 2001 P.12.

78 Daily Trust Newspaper, Wednesday 23 Feb 2011 P.32.

The Democratic People's Party (DPP) fired on by asserting that:

As the biggest opposition party in the state, it will no longer fold its arms in the event of any further provocation by the PDP. We are therefore prepared to meet force with force should the PDP or any of its agents resort to any further violent act against our party before and during the April general election.

Also reporting on the same issue, the *Daily Trust* had this to say:

As the April general elections approach, there are worrying signs that the spate of political violence in some parts of the Northwest could degenerate further unless the authorities move quickly to check the trend.⁷⁹

There can be no free, fair and credible election in the face of threats and counter threats of intimidation and violence.

Delay in the Administration of Justice

One perennial problem in the administration of Justice in any legal system is the question of delay. Delay could be caused by the police, the lawyers, the courts, and lack of judicial and nonjudicial personnel. Even in the most articulate democracy, delay cannot be completely avoided. The problem is that when delay becomes inordinate, to the extent that injustice is done to the parties, the rule of law, which is a lifeblood of democracy, is hurt.⁸⁰ There is so much delay in the administration of justice in Nigeria that one wonders whether the parties get value justice

⁷⁹ Daily Trust Newspaper, Wednesday 23 Feb 2011 P.32.

⁸⁰ Ayua I.A. op.cit 135.

at the end. Some election petitions in Nigeria arising out of the 2007 elections, notably Ekiti and Osun governorship election petition were decided in 2010.

Corruption

It is a notorious fact that Nigerians in both high and low places influence civic decision in their favour by employing corrupt means.⁸¹ This is generally referred to as “long leg” and it does not matter whether the physical legs of the corrupter are short. He rides on the cliché or axiom and parades his so called long legs to influence civic decisions thus alternating, and at times, demolishing democracy in the polity.⁸² The corruption in the polity seem to have affected the judicial arm of government. Also, as was noted in the words of the NBA National President while setting up a panel to probe Katsina-Alu, Salami face-off in the following words “Katsina-Alu / Salami face – off: debilitating corruption eating into and corroding the entire judicial system.

In Balance in the Nigeria Federal Set Up

The colonial masters left a weak federal structure for the country where one region of the country was almost equal to the two other region put together. The foundation of the federal structure was laid on fear and antitrust among leaders of the regions.⁸³

Essentially, a federation is a process of bringing about a dynamic equilibrium between the centrifugal and centripetal forces in a society, ensuring that no single region or component wield powers such that it can hold the others to ransom. However,

⁸¹ Ibid.

⁸² Ibid P.136.

⁸³ Ibid.

in the Nigeria federal structure there is over centralisation of power and revenue at the centre (i.e., federal government) thus reducing the states to the position of beggars from the largesse of the federal government, the resultant effect of which could be politically disastrous. Politically it results in the overburdening of the centre and the fostering of inordinate ambitions of ethnic groupings to control the centre with the sole purpose of personal aggrandisement and this could result in an uneven distribution of national resources between the states.⁸⁴ This creates an unusual tension in the nature of competition for political offices at the centre and results in the use of all known means to grab offices, thereby undermining the growth of democracy.

Disobedience to the Rules of Game- Election Laws and Rules

It is common knowledge that during the electioneering campaigns of the 1983 election, there were intra and inter party wranglings which resulted in rigging of the election and falsification of results and the use of power of incumbency in some circumstances to declare results that were in direct disagreement with the choice of the people. Sometimes, thugs were employed to destabilise elections, making them unfree and unfair.

Other elections in Nigeria after 1983 are not different. The 1999, 2003 and 2007 elections in Nigeria were marred by increasing level of violence, rigging and other electoral malpractices that made them everything else but free, fair and credible.⁸⁵ The forthcoming April 2011 election promises not to be any better if the acrimonious PDP presidential primary electioneering campaign is any thing to go by. Media reports of impending violence and

85 Thisday Newspaper, Thursday, February 24 2011 P.9.

other security challenges in the April 2011 general elections are all over Nigeria for every one to read.⁸⁶

A picture of the obvious promise to the disobedience to the rules of the game by political parties in Nigeria is painted by the report of the rivalry between the Labour Party and the Peoples Democratic Party in Nasarawa State by *Daily Trust*.⁸⁷ The paper reports that:

The Labour Party (LP) and the Peoples Democratic Party (PDP) in Nasarawa State have engaged each other in a war of words over allegations that the PDP is buying-up voters cards to rig the April elections.

Conclusion

This chapter concludes in agreement with the position of the Academic Staff Union of Universities (ASUU) published in *The Nation* on the 2011 elections thus:

The current developments in the political life of Nigeria have vindicated those who have been telling Nigerians that our rulers are not committed to winning political power through the popular democratic route. The behaviour of the rulers and their parties has shown that the structures, process and rules which govern the elections are already rigged against the people. What is going on is not an exercise in the People's Democratic choice.

First, the ease with which failed candidates in one party have become endorsed candidates by others, - with no prior relationship, and the formation of alliance

86 The Nation op.cit P.12.

87 Daily Trust Newspaper Wednesday Feb. 23, 2011.

founded on no principles, have shown that greed for power and accumulation remains the driving force in our rulers' politics. No parties have presented a programme aimed at freeing Nigeria from the grip of neo-liberal domination of Nigeria's economy. None of them has questioned the transfer of public assets to private individuals and groups within the ruling class. They have not presented Nigeria with any credible plan to transform Nigeria's education, health care, transport system and all welfare institutions. They have no independent development programmes.

They remain subservient clients of European and American neo-liberal governments, the IMF and the World Bank. The party that workers formed has not kept faith with its class origin. It has become a refuge for runaway ruling class candidates who have lost the race for nomination in ruling class parties. The domination of Nigeria's economy by a few who have cornered the wealth through dubious means is not an issue for any known party. The criminal reward-system where legislators have given themselves remuneration five-fold that of presidents of richer countries while the minimum wage proposed is the starvation wage of N18,000:00, is not an issue. Generally, the parties are not addressing how to retrieve the sovereignty of the Nigerian people. They have not shown seriousness about ending poverty and building a welfare state.

The ruling class parties cannot address the issue of 'tribe' politics because they need tribal politics to survive. Their politics cannot resolve the problem of security. Their politics breeds insecurity. The primaries that have just ended have been anything but free and fair. Bribery, violence, intimidation, murder, imposition of candidates, were used in all the parties by politicians contemptuous of the people and desperate to be given a ticket

to pocket our national wealth. The ruling class politicians behaved predictably during the registration exercise: sponsored multiple registrations, organised the stealing of voting machines, bribing registration officers, infiltration of the ranks of registration officials, and intimidation of citizens from registration.

The conclusion is that ruling class politicians have shown no commitment to free and fair elections. The ruling class will not give up its culture of rigging unless it is forced to do so. It is doubtful that the police and other security agencies will refuse to collaborate in perpetuating the culture of rigging. The 2011 elections will not put the people in power. They remain a ruler's game. To forge genuine democracy, Nigeria needs a genuine party of the people which will be operated on free democratic principles and provide a true alternative to the private properties that are called "Political Parties".

Until the people are in power, the achievement of genuine democracy in Nigeria will remain a mirage. The people can only be put in power by an unflinching commitment by the Nigerian governments to the implementation of the provisions of chapter 11 of the 1999 Constitution of the Federal Republic of Nigeria as amended in 2010 regarding the Fundamental objectives and Directive principles of state policy. It is recommended that the Nigerian Constitution should further be amended to remove anything that could impede the enforcement of the provisions of its chapter 11 by the courts.

Chapter Fifteen



The Justiciability and Enforcement of Social Rights: An Appraisal of Emergent Comparative International and Regional Case Law

Kaase Tony Fyanka*

Introduction

The aim of this article is to determine how the jurisprudence developed from emergent comparative international and regional case law relating to the justiciability and enforcement of social rights, has effectively strengthened the arguments for same.

In constitutional law theory, social rights are not justiciable and enforceable. Given this background it appears that the enforcement¹ of same will not be successful. Curiously, there is development that points to the contrary. This development

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1 Contiades, X., "Social Rights in the Era of Global Financial crisis", VIIIth World Congress of the International Association of Constitutional Law, Mexico, 2010, Constitutions and Principles, Presentation submitted to Workshop 9: Proportionality as a Principle (Wednesday, 8 December, 2010), pp. 2 – 3. Available at: <http://www.juridicas.unam.mx/wcccl/ponencias/9/163.pdf> .

is traceable to an emergent comparative case law which demonstrates otherwise. Critically this development seems to speak favourably for the justiciability and enforcement of social rights. This article will appraise the arguments in each decision to determine how aspects of governmental policy and expenditure have been adjudicated by international and regional human rights monitoring and implementation bodies. In the main, this article will demonstrate that the process has effectively enhanced the arguments for the justiciability and enforcement of social rights.

This is interesting, considering that many national constitutions have not enshrined social rights. This article will elucidate and appraise the strategies that international and regional human rights monitoring and implementation bodies have adopted in the various decisions to develop the emergent jurisprudence. This will include discourse on such strategies as distilling social rights from civil and political rights to demonstrate an expanding social rights jurisprudence wherein the bodies have played a role in supervising positive obligations. This is particularly with regard to where there is governmental inaction or discrimination in the implementation of policies and programmes. Accordingly, this article will demonstrate through the emergent jurisprudence how states are held accountable under international law for violations of human rights arising from actions or inactions on their parts in several contexts.

Another form of jurisprudence developed by international and regional human rights monitoring and implementation bodies which will be discussed pursuant to the aim of this article is that which demonstrates that social rights can be directly derived from civil and political rights. For example the right to life implies the right to water and food.

In the determination of its aim, this article will proceed with a discourse regarding the status of the justiciability and enforcement of social rights. Thereafter an appraisal of the emergent case law involving same will be discussed and lessons drawn from same. Finally the conclusion will be made.

The Status of the Justiciability and Enforcement of Social Rights

Social rights impose positive obligations on the state to fulfil certain duties in order to protect its people. Examples include the right to basic levels of health care, the right to housing, the right to education, the right to nutrition, the right to social protection, the right to occupation, the right to collective representation, the right to social security, and the right to culture. The implication is that there is positive obligation on governments to ensure its citizens live and work in conditions, which are suited to a basic level of human dignity.²

Social rights are considered as "instruction norms to the government" than autonomous and directly justifiable rights.³ This is because, these are rights to which the individual citizen is entitled to, which can be exercised only in their relationship with other human beings; as a member of a group and which can be made effective, only if the state acts to safeguard the individual's environment.

The uniqueness of social rights derives from the fact that they are conditional on material resources for their fulfilment.⁴ In addition these categories of rights promote social interdependence

2 <http://www.enelsyn.gr/papers/w13/Paper%20by%20Sarantis%20Orfanoudakis.pdf>.

3 Ibid.

4 International Covenant on Economic Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27 Art. 2.

and ensure individual entitlement at the same time. Accordingly, social rights are at once universal and responsive to the ineluctable differences among people in terms at least of age, gender and cultural traditions. For all these reasons, social rights are especially difficult to frame successfully and as such are held to be non-justiciable.

Typically social rights are distinguished from civil and political rights. Indeed a “traditional” or “generational” approach to human rights protection renders a view where civil and political rights are distinguished from social rights on the ground that the latter are non-justiciable.⁵ The principal argument advanced in favour of the non-justiciability⁶ and enforceability of social rights relates to the text of Article 2 of the International Covenant on Economic Social and Cultural Rights.⁷ Here, it has been argued that the covenant is framed in means and ends and the provisions are expressed as state obligations and not individual rights. Article 2 of the ICESCR provides;

Each state party to the present Covenant undertakes to take steps...to the maximum of its available resources...to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

5 A Fair deal: Justiciability of ESC rights – Human Rights Features, 58th Session of the CHR, April 2002. Available online at: <http://www.hrdc.net/sahrdc/hrfchr58/Issue3.htm#A%20fair%20deal>.

6 International Covenant on Economic Social and Cultural Rights, Supra, note 4, Art. 2.

7 Shany, Y., “Stuck in a moment in time: The International Justiciability of Economic, Social and Cultural Right”, published by the International Law Forum of the Hebrew University of Jerusalem Law Faculty (ILF), Research Paper No. 9-06 (2006) p. 9. Retrieved December 21, 2009 from <http://www.ssrn.com/abstract=920753>.

Be that as it may, the Committee on Economic Social and Cultural Rights (CESCR)⁸ has held that Article 2 of the Covenant does not undermine the justiciability and enforceability of social rights.⁹

Jurisprudentially, whilst civil and political rights were developed as a constraint upon the unwarranted interference of governments with the everyday lives of their citizens, social rights began to play a role after people were elevated from the status of subjects to that of citizens. In this sense, they emerged at a later point of time than civil and political rights did. In other words, the discussion of social rights coincided with the emergence of the welfare state.¹⁰

The emergence of social rights is placed in the twentieth century. They have been described as belonging to the second generation of fundamental rights.¹¹ In the first generation civil and political rights are included, while a third generation of rights has recently emerged, comprising rights like the right to self-determination or the right to a clean environment.¹²

8 The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. The Committee meets in Geneva and normally holds two sessions per year, consisting of a three-week plenary and a one-week pre-session working group. The Committee also publishes its interpretation of the provisions of the Covenant, known as general comments.

9 The CESCR has taken several important steps in insisting that a number of the rights are justiciable, despite the popular misconception that they are not and this is evidenced in various General Comments. General Comment 9 on the domestic applicability of the norms is of particular significance in that it is perhaps the strongest statement from any UN body about the need for states to transform their international obligations into effective remedies.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

The nature of social rights and the claims they make determines the arguments against its justiciability. Indeed freedom from the state is achieved when civil and political rights are exercised. In relation to social rights, freedom can only be achieved through the action of the state's help. Critically, social rights shape and affect policy making, carried out by the legislature.¹³ It is for this reason that social rights are recognised and given effect in dissimilar ways in different countries; every national government deciding according to its own priorities for the treatment of such rights.

In addition, the ideological divide between social rights and civil political rights, namely first and second generation of rights exacerbates the problem. Understandably the term "second generation" relates logically to the fact that the instruments comprising social rights came chronologically after the first generation. The implication however is that this dichotomy tends to denote a less important label to social rights in comparison with civil and political rights.

Consequent upon these problems, the arguments against the justiciability and enforcement of social rights are many and varied. One of such arguments is founded on the normative value of social rights which is based on the argument of real-substantial freedom.¹⁴ According to this view, the real-substantial freedom is the essential complement of the so-called legal freedom, the latter being the legal possibility of the individual to act or not act in a certain way.¹⁵ The implication is that given the interdependence of the so-called legal freedom

13 Economic and Social Rights and the Right to Health: An Interdisciplinary Discussion held at Harvard Law School in September, 1993, **organised** by the Human Rights Program Harvard Law School and the Francois Xavier Bagnoud Center for Health and Human Rights Harvard School of Public Health, 1995, p. 2.

14 Garrett J. Amartya Sen's Ethics of Substantial Freedom, p. 4. Published and available online at: <http://people.wku.edu/jan.garrett/ethics/senethic.htm>.

15 Ibid.

and the real-substantial freedom, it is held that the constitutional consolidation of social rights forms a prerequisite for their enjoyment.

This conclusion is reinforced by the theory of the complementarity of rights. In other words, social rights form a necessary complement to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security.¹⁶ For example, the right to a fair trial, which falls under the category of civil and political rights, requires positive action through the establishment and maintenance of an adequate judicial and law enforcement system. Indeed since social rights traditionally form a weaker sub-category of human rights, they demand enhanced protection.

Conversely, the same argument of the real-substantial freedom is also used by the adversaries of social rights' normative value. In particular, they consider social rights as obstacles for the fulfilment of civil rights and liberties, since the state interventions with redistributive characteristics basically restrain the right to ownership, as well as economic freedom in general.¹⁷

Added to this is the argument which is being used both in favour and against the normative value of the justiciability and enforceability of social rights. This refers to their extremely vague and abstract wording.¹⁸ It is argued that such wording does not allow for the extraction of justiciable claims from social

16 Young, K., "The Minimum Core of Economic and Social Rights: A Concept in Search of Content", *The Yale Journal of International Law* [Vol. 33: 113], p. 128.

17 Garret, J., *Supra*, note 16. p. 4.

18 Fyanka. K. A., "Legal Certainty, Legal Interpretation and the Justiciable Normative Development of the International Covenant on Economic Social and Cultural Rights", Accepted for publication in *Frontiers of Nigerian Law Journal: A publication of the Faculty of Law, Benue State University, Makurdi.* (Vealumun Tarhule, Esq, et al. eds, 2010), pp. 7 -12.

rights, even when the latter are included in the constitutional texts. On the other hand, the abstract and theoretic wording applies to the whole of the constitutional text, without this preventing other provisions to be directly applicable.

In the main, the debate on whether social rights are justiciable and enforceable and fit to be constitutionally entrenched reveals a much deeper debate concerning the scope and object of state actions as well as the function and content of the Constitution. Accordingly the development of the jurisprudence which enhances its justiciability and enforceability by international and regional human right systems is instructive. This article shall now appraise the emergent comparative case law.

Appraisal of Emergent Comparative Case Law on the Justiciability and Enforcement of Social Rights

It has been discussed that while constitutional law theorists hold that social rights are not justiciable and enforceable, there is however sufficient case law to demonstrate otherwise. The emergent comparative case law will be explored in this section. In the process this article will reveal expanding social rights jurisprudence wherein international and regional human rights systems have played a role in supervising positive obligations. This discourse shall commence with the appraisal of the International case law starting with United Nations Human Rights Committee.

International Case Law

The Human Rights Committee was established to adjudicate the International Covenant on Civil and Political rights¹⁹ A number of cases of a social rights character have been brought before the Human Rights Committee. One of such cases is that between *Waan – de Vries v. The Netherlands*.

To appreciate the appraisal of the jurisprudence, it is important to review the facts. These are to the effect that the author of the communication is Mrs. F. H. Zwaan-de Vries, a Netherlands national residing in Amsterdam, the Netherlands, The author was born in 1943 and is married to Mr. C. Zwaan. She was employed from early 1977 to 9 February 1979 as a computer operator. Since then she has been unemployed. Under the Unemployment Act she was granted unemployment benefits until 10 October 1979. She subsequently applied for continued support on the basis of the Unemployment Benefits Act (WWV). The Municipality of Amsterdam rejected her application on the ground that she did not meet the requirements because she was a married woman; the refusal was based on section 13, subsection 1 (1), of WWV, which did not apply to married men. Thus, the author claims to be a victim of a violation by the state party of article 26 of the International Covenant on Civil and Political Rights, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The author claims that the only reasons she was denied unemployment benefits are her sex and marital status and contends that this constitutes discrimination within the scope of article 26 of the Covenant.

19 International Covenant on Civil and Political Rights (ICCPR) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

The author pursued the matter before the competent domestic instances. By decision of 9 May 1980 the Municipality of Amsterdam confirmed its earlier decision of 12 November 1979. The author appealed against the decision of 9 May 1980 to the Board of Appeal in Amsterdam, which, by an undated decision sent to her on 27 November 1981, declared her appeal to be unfounded. The author then appealed to the Central Board of Appeal, which confirmed the decision of the Board of Appeal on 1 November 1983. Thus, it is claimed that the author has exhausted all national legal remedies.

In deciding the case, the Human Rights Committee found a violation of Article 26 of the ICCPR, which provides that all persons are entitled without any discrimination to equal protection of the law and that this protection applied to the social rights domain. The committee found that the right to nondiscrimination in article 26 was an independent right. If there was discrimination in the social rights domain, that could not be objectively justified, it was a violation of the covenant. In this case they found the legislation unreasonable. The committee observed that the provisions of Article 2 of the ICESCR do not detract from the full application of article 26 of the ICCPR. Examining the State party contention that article 26 of the ICCPR cannot be invoked in respect of a right which is specifically provided under article 9 of the ICESCR (social security, including social insurance), the committee contended that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the UDHR. Article 26 is thus concerned with the obligations imposed on states as regards their legislation and their application thereof. The committee further stated that while article 26 does not require any state to enact legislation to provide for social security, however when such

legislation is adopted, then it must comply with article 26 of the Covenant (Para 12.4).

In appraising this case, it is submitted that the effectiveness of this decision is that what is at issue is not whether security should be progressively established in the Netherlands, but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the ICCPR; and the guarantee given therein to all persons regarding equal and effective protection against discrimination. It is no wonder that the legislation was repealed before the decision, and an appropriate remedy for Mrs. Zwaan de Wries was recommended. This normative jurisprudence gives support to the fact that social rights are justiciable and can be enforced even where the issues arise in violations of civil and political rights.

Regional Case Law

Under the regional systems for the protection of human rights, the jurisprudence developed under the European Convention on Human Rights,²⁰ the African Charter on Human and People's Rights and the Inter American Human Rights systems shall be discussed.

The European Convention on Human Rights, otherwise known as the Convention for the Protection of Human Rights and Fundamental Freedom, is a convention that was passed by the Council of Europe²¹ in 1950 in response to the Universal

20 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

21 The Council of Europe should not be confused with the European Union - they are separate organisations even though they both share the same flag. However, all countries who are members of the Union are also members of the Council: not the other way round.

Declaration of Human Rights which was drawn up by the United Nations (UN) in 1948. The aim of the convention is to give people who live in European states a list of civil and political rights which the member states of the Council of Europe believed every person in Europe should expect to have.

The European Commission of Human rights was founded under the Convention.²² The role of the Commission is to investigate claims of human rights abuses, made by states or individuals. Once investigations have been carried out the findings are passed onto the European court of Human Rights,²³ who has the compulsory jurisdiction, recognised by many states, to try individuals or governments for human rights abuses.

The case of *Lopez Ostra v. Spain*²⁴ is instructive in the jurisprudence of the European System for the protection of human rights as it relates to the justiciability and enforcement of social rights. Originally, the case was referred to the European Court of Human Rights by the European Commission of Human Rights on 8 December 1993, within the three-month

22 Before the European Commission on Human Rights became obsolete in 1998 with the restructuring of the European Court of Human Rights, it held an important role in assisting the European Court of Human Rights from 1953 to 1998. Commission members were elected by the Committee of Ministers and would hold office for six years (during which time they were to act independently, without allegiance to any state). Their role was to consider if a petition was admissible to the Court. If so, the Commission would examine the petition to determine the facts of the case and look for parties that could help settle the case in a friendly manner. If a friendly settlement could not take place, the Commission would issue a report on the established facts with an opinion on whether or not a violation had occurred. A Committee of three people determined the admissibility of a petition. For difficult decisions, however, a Chamber consisting of seven people handled it.

23 The European Court of Human Rights in Strasbourg is a supra-national court, established by the European Convention on Human Rights, which provides legal recourse of last resort for individuals who feel that their human rights have been violated by a contracting party to the Convention.

24 Communication No: Series A No 303-C; (1995) 20 EHHR 277, ECtHR Case Number: 41/1993/436/515.

period laid down by Article 32 Para. 1 and Article 47 of the Convention. It originated in an application (no. 72 16798/90) against the Kingdom of Spain lodged with the Commission under Article 25 (art. 25) by a Spanish national, Mrs. Gregoria Lopez Ostra, on 14 May 1990.

The facts of the case are that a waste treatment plant was built, with a state subsidy, on municipal land near a town centre and 12 meters from the home in which Lopez Ostra (L) lived with her husband and two children. It began operating, without seeking or being granted a licence, in July 1988 and emitted fumes, smells and contamination which caused health problems and nuisance to many residents in the town. The council evacuated and rehoused them for three months but Lopez and her family returned home in October 1988. A partial shutdown of the plant's activities was ordered by the council but many experts maintained that certain nuisances continued to endanger the health of those living nearby. Lopez made a special application for the protection of fundamental rights, alleging that various constitutional rights had been infringed by the council's passive attitude to the nuisance and risks caused by the plant. This attempt to obtain an order for the temporary or permanent cessation of the plant's activities was unsuccessful at first instance and in both appeal courts. Lopez's sisters-in-law brought administrative proceedings against the council and the owner of the plant for its unlawful operation. They also lodged a complaint which led to the institution of criminal proceedings against the owner for an environmental health offence. The courts in both sets of proceedings, which were still pending, had ordered the plant's closure but had then allowed appeals against this by the council and the owner in the administrative case and crown counsel in the criminal case. An expert opinion for the latter proceedings indicated that the gas levels emitted from the plant

exceeded the permitted levels and were the likely cause of a health problem for Lopez's daughter and nephew. Lopez was also advised by a paediatrician that her child should be moved from the area. In February 1992 Lopez and her family were rehoused in a flat in the town centre, for which the council paid the rent. However, the inconvenience resulting from this move and the precariousness of their housing situation prompted them to purchase a house in a different area in February 1993. The criminal court ordered the temporary closure of the plant in October 1993. Lopez complained about the inactivity in respect of the nuisance caused by the plant.

The government objected that Lopez, like her sisters-in-law, should have brought criminal and administrative proceedings rather than make a special application for protection of fundamental rights since that was inappropriate for raising questions of compliance with the ordinary law or for disputes of a scientific nature. It also objected that Lopez had ceased to be a victim, having been rehoused, and that any nuisance had ended with the closure of the plant.

In deciding the case, The European Court of Human Rights found a breach of Art 8 but not of Art 3. The Court held the application admissible and expressed the unanimous opinion that there had been a violation of Article 8 but not article 3. The Court stated that neither Lopez's move nor the temporary closure of the plant altered the fact that she and her family lived for years only 12 meters away from a source of smells, noise and fumes. It further held that severe environmental pollution may affect the individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely without, however, seriously endangering their health. The Court held that the state failed to succeed in striking a balance between the interest

of the town's economic well being in having a waste treatment plant and the applicant's effective enjoyment of her individual right to respect for her home and her private and family life making a reference to the fact that L's family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences and they only moved when it became apparent that the situation could continue indefinitely and the doctor of L's daughter so recommended. Therefore, it held that there had been a violation of Article 8 of the Convention and awarded compensation of ESP 1.5 million, less the legal aid already paid, for costs and expenses before the ECHR institutions. The Court held further that the conditions in which the applicant and her family had lived, although were very difficult did not amount to degrading treatment within the meaning of Article 3.

Normatively, the decision in this case demonstrates the justiciability and enforceability of social rights; in this case, the right to health. The decision is instructive considering that the jurisprudence was constructively distilled from classical civil and political rights. As noted by Verma,²⁵ it is important to understand that the case law of the European Court of Human Rights is particularly helpful in demonstrating how the right to a fair trial affords protection not only to civil and political rights but to social rights as well. As observed by Scheinin,²⁶ in more recent cases on various types of social security or social assistance benefits the European Court has gradually expanded the requirement of full fair trial rights to

25 Verma, S., *Justiciability of Economic Social and Cultural Rights*, The International Council on Human Rights Policy Review Meeting: Rights and Responsibilities of Human Rights Organisations, Geneva, 15 March, 2005.

26 Scheinin, M., *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*. In: Orlin, Theodore / Rosas, Allan / Scheinin, Martin (eds.). *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, Abo: Institute for Human Rights, Abo Akademi University, (2000), p. 244.

many dimensions of social rights, thus contributing to a growing interdependence between different categories of human rights and the recognition of judicial guarantees as constituent element of the rule of law.

On the African continent, the jurisprudence crafted under the African Charter on Human and Peoples Rights²⁷ is relevant to this discourse. The African Charter on Human and Peoples Rights is unique as it encompasses all human rights. Consequently, social rights are as important as any other. Indeed, the African Commission on Human Rights²⁸ is of the view that enforcement of human rights must not be discriminatory. Accordingly, all of the rights enshrined in the Charter is enforceable, such that there is hardly a right at the international level that cannot be subject to protection in the African system. This is the benefit of Articles 60 and 61, under which the Commission has the mandate to go beyond the Charter rights to look at international standards. In this regard, the case involving SERAC and the *CESCR v. Nigeria*, is instructive.²⁹

In *SERAC and CESR v. Nigeria*, the communication alleged that the military government of Nigeria has been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused

27 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

28 The African Commission on Human and Peoples' Rights (ACHPR) is a quasi-judicial body tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent as well as interpreting the African Charter on Human and Peoples' Rights and considering individual complaints of violations of the Charter. The Commission came into existence with the coming into force, on 21 October 1986, of the African Charter (adopted by the OAU on 27 June 1981).

29 Case No. 155/96. Decision at the 30th Ordinary session, Banjul from 13-27 October 2001.

environmental degradation and health problems, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancers, neurological and reproductive problems resulting from the contamination of the environment among the Ogoni people.

The communication alleged that the government was guilty of violations of the right to health, the right to dispose of wealth and natural resources, the right to clean environment and family rights due to its condoning and facilitation of the operations of oil corporations in Ogoniland.

In deciding the case, the Commission ruled that the Ogoni had suffered violations of their right to health (article 16) and the right to a clean environment (article 24) due to the government's failure to monitor oil activities and involve local communities in decisions violated the states duty to protect its citizens from exploitation and despoliation of their wealth and natural resources (article 21). The Commission suggested that a failure to provide material benefits for the Ogoni people was also a violation.

The Commission also held that the implied right to housing (including protection from forced eviction), which is derived from the express right to property, health and family, was violated by the destruction of housing and harassment of residents who returned to rebuild their homes. Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the implied right to food.

The Commission issued orders to the Nigerian Government to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation

to victims, to prepare environmental and social impact assessment in future and to provide information on health and environmental hazards.

In the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. The Commission held that the state is under an obligation to respect the noted rights and this entails largely non-interventionist conduct from the state, for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual. It went on to further state that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.

It is submitted that the jurisprudence is normatively significant. The significance of the SERAC case lies in the fact that the complainants did not petition local or national courts, but went straight to the African Commission on Human Rights. This is unique because under the Charter, before bringing a complaint to the Commission, a petitioner must exhaust domestic remedies. However, this rule was waived in the SERAC case because of the background that involved a military government of Nigeria that had ousted the jurisdiction of the courts from reviewing government acts. Legally, the ouster clauses potentially violated the national Constitution of Nigeria and the African Charter. The cumulative effect is that this development demonstrates the seriousness that the Commission attaches to the protection of social rights, thus lending credence to its justiciability and enforceability. Normatively, this decision

demonstrates clearly that under the African Charter on Human and Peoples Rights, social rights are justiciable and enforceable. This jurisprudence is important for African states parties whose constitutions continue to maintain the non-justiciability of social rights. The significance of this jurisprudence is that it is likely to influence constitutional reform in favour of social rights for those African states parties that have incorporated the charter into their domestic law.

The inter-American system for the protection of Human Rights comprises several instruments which provides for the protection of human rights.³⁰ These includes the various declarations, conventions, and protocols that spell out the mandate and functions of the organs of the system namely the Inter American Court of Human Rights and the Inter-American Commission on Human Rights as well as the obligations of the member states of the Organisation of American States (OAS)³¹ in the field of human rights. The basic documents include the American Declaration of the Rights and Duties of Man³² and the American Convention on Human Rights.³³ These are followed by the

30 As of June 30, 2010, 21 States party to the American Convention have recognised the Court's contentious jurisdiction. As of June 30, 2010, the 21 States that have recognised the contentious jurisdiction of the Court are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. For an updated list of these States, see the IACHR website at www.cidh.org. The Inter American Commission on Human Rights has the principal function of promoting the observance and defense of human rights in the Americas. Articles 18, 19, and 20 of the IACHR's Statute establish the Commission's functions and powers, clearly distinguishing the Commission's powers with respect to the States party to the American Convention from those that refer to the member states of the organisation not parties thereof. With respect to the latter, the Commission's competence is based on the provisions of the OAS Charter and the practice of the IACHR. The Commission's competence in relation to the States parties to the American Convention is established in said treaty.

31 O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978.

32 The American Declaration of the Rights and Duties of Man Adoption: May 2, 1948. The American Declaration establishes that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."

33 The American Convention on Human Rights ("Pact of San José, Costa Rica") Adoption: November 22, 1969. Entry into force: July 18, 1978.

inter-American convention against torture,³⁴ the additional protocol to the American Convention on economic, social and cultural rights³⁵ and on the death penalty,³⁶ the inter-American conventions on violence against women,³⁷ forced disappearance of persons³⁸ and discrimination against persons with disabilities.³⁹

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights and its protocol, particularly that relating to justiciability and enforcement of social rights. The Inter American Commission on Human Rights also functions alongside the court.

The jurisprudence arising from the case law of the Inter-American Court of Human Rights and the Inter American Commission on Human rights demonstrates expanding social rights jurisprudence. This case law will now be appraised starting with that of *Amilcar Menéndez, Juan Manuel Caride, et al. v. Argentina*.⁴⁰

34 The Inter-American Convention to Prevent and Punish Torture Adoption: December 9, 1985. Entry into force: February 28, 1987.

35 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999.

36 The Protocol to the American Convention on Human Rights to Abolish the Death Penalty Adoption: June 8, 1990. Entry into force: August 28, 1991.

37 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") Adoption: June 9, 1994. Entry into force: March 5, 1995.

38 The Inter-American Convention on Forced Disappearance of Persons Adoption: June 9, 1994. Entry into force: March 28, 1996 .

39 The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities Adoption: June 7, 1999. Entry into force: September 14, 2001.

40 Case N° 11.670. Report N° 03/01.

The facts of this case are that between December 27, 1995 and September 30, 1999, the Inter-American Commission on Human Rights (IACHR) received numerous petitions filed by retired persons and several non-governmental organisations. The petitions claimed violations of the rights to effective judicial remedy, due legal process, property, social security, health, wellbeing and equal protection, which are enshrined in the American Declaration on the Rights and Duties of Man (ADRDM) and in the American Convention on Human Rights (ACHR). Specifically, the petitioners had filed claims before the Argentine National Social Security Administration (ANSES) requesting that their social security benefits be adjusted or calculated.

As their claims were rejected by the administrative agency, they resorted to the domestic courts. According to the petitions, retired persons seeking an adjustment in their retirement benefits had to deal with a cumbersome administrative and judicial system that failed to realise their rights. The fundamental violations alleged focused on delayed court decisions, as well as their delayed or inadequate enforcement. The petitioners particularly questioned Law 24463, whose terms enabled postponing enforcement of judgments favourable to them due to budgetary restrictions and indefinitely postponing payment of social security adjustments. Furthermore, the petitioners claim that their right to property is thereby adversely affected, and that the social security system violates the right to equal protection, because there are groups of privileged retired persons (members of the legislative and judicial branches, the military and former executive branch officials). The petitioners also maintain that this situation adversely affects their right to health, wellbeing and life, since it prevents them from buying food, essential services or medicines.

In deciding the case, the Commission declared the case admissible in respect of violations of the rights to health, well-being and social security enshrined in ACHR. In 2003, a friendly settlement process was started. Since then, the parties have conducted work meetings to discuss reforms to law 24463. The petitioners prepared a project to modify the law that is currently being discussed and a list of beneficiaries, including their claims. The Social Security Department has instructed the competent body to strictly enforce confirmed court decisions.

Jurisprudentially, this case is of major normative importance because the Inter-American Commission on Human Rights has acknowledged its competence to hear cases of violations of social rights enshrined in the ADHR that have been brought before courts. This acknowledgment extends the enforceability potential of social rights within the Inter-American system. Furthermore, this case shows that friendly settlement processes provide a fruitful framework to promote effective remedy for violations of social rights.

The Commission did a massive job of enhancing its jurisprudence further when it dealt with the case of *Jorge Odir Miranda Cortéz v. El Salvador*.⁴¹ The facts of this case are that on January 24, 2000, a petition was filed against the state of El Salvador before the Inter-American Commission on Human Rights (IACHR) alleging violation of the rights to life, health and full development of personality of a group of persons living with HIV. The case was grounded on the state's failure to provide them with the triple therapy medication needed to prevent them from dying and to improve their quality of life. The

41 N° 12.249. Informe de admisibilidad N° 29/01. Case profile available at: http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=417101.

petitioners also claimed that the situation of the said persons constituted an instance of cruel, inhumane and degrading treatment. The IACHR requested the state to adopt urgent precautionary measures in respect of the alleged victims in this case so that they could receive relevant medical services and antiretroviral medication. Consequently, the Supreme Court of San Salvador issued a resolution ordering the supply of the drugs to the petitioners starting in December 2000.

In deciding the case, the Commission declared the case admissible in respect of alleged violations to the rights enshrined in articles 24 (equal protection), 25 (judicial protection) and 26 (social rights) of the American Convention on Human Rights (the Convention). The Commission stated that "although establishing violations to article 10 of the Protocol of San Salvador is beyond our competence, (...) the standards referring to the right to health will be considered in our analysis of the merits of the case, pursuant to articles 26 and 29 of the Convention." Upon issuing this decision, the Commission made itself available to the parties to help reach a compromise. In November 2001, the petitioners considered that the friendly solution process had failed and requested the Commission to decide on the merits of the case. In 2004, the IACHR issued its (confidential) report on the merits of the case, confirming the violations and issuing recommendations. The parties are currently trying to reach an agreement on how to comply with the recommendations.

In appraising this case, it is submitted that in a most valuable interpretation, the Commission understood that the right to health is protected by the American Convention in its Article 26 and, consequently, it is empowered to hear individual cases of violations. The normative significance of the case is the direct enforceability of the right to health. The Commission's

involvement in the case led the Salvadorian Supreme Court to order medication to be supplied to the petitioners. This is significant indeed in strengthening the arguments for the justiciability and enforceability of social rights.

The impact of these developments resonated in Argentina when the domestic Court made a landmark and cutting edge decision in favour of the justiciability and enforcement of social rights in the case of *Viceconte, Mariela Cecilia v. Argentinian Ministry of Health and Social Welfare*.⁴² In this case, the plaintiff, Mariela Viceconte, and the National Ombudsmen requested the court to order that the Argentine government take protective measures against hemorrhagic fever, to produce the Candid-1 vaccine and to rehabilitate those environments where the disease was breeding.

In deciding this case, the court found that the government had not punctually fulfilled its obligations to produce the vaccine and made the Ministers of Health and Economy personally liable for its production within a specified time schedule. The latter had control over the release of budgeted funds.

In appraising this case, it is submitted that the Viceconte case is a key precedent in Argentine case law relating to the justiciability and enforcement of social rights. The normative importance of the court decision lies, on the one hand, on the fact that it strengthened the role of the collective amparo action as a means of citizen participation and control of public matters, by evidencing the process' function as a space of dialogue between the citizens and the state. On the other hand, the decision acknowledged the legitimacy of the claimant's

42 Poder Judicial de la Nación, Causa n° 31.777/96. June 2, 1998.

request that a vaccine be manufactured for 3,500,000 people living in the affected area.

Furthermore, this instance of direct application by a domestic court of right to health standards enshrined in international covenants, such as article 12 of the International Covenant on Economic, Social and Cultural Rights, contributes to enhance the legal apparatus available to defend human rights. The decision also reaffirms the state's role as guarantor of the right to health where certain services or benefits are not profitable or convenient for private providers. Finally, the case shows the importance of the courts in controlling the allocation and execution of budget line items. In the case of collective actions demanding protection for social rights, the implementation of public policies, with their corresponding budget appropriations, is at stake. Essentially, a productive dialogue has been established between the state's political powers and the courts, with each one applying its own institutional competencies to achieve the realisation of the right to health. This indeed was a massive victory for strengthening the arguments for the justiciability and enforcement of social rights.

Conclusion

The appraisal of the emergent comparative case law of the international and regional human rights systems as they relate to the justiciability and enforcement of social rights demonstrate compelling expanding social rights jurisprudence of high normative value. The evidence is influencing and it strengthens the arguments for the justiciability and enforcement of social rights in the domestic systems of states that still hold this category of rights as non justiciable. It is interesting to note that in jurisdictions where social rights have not been directly provided for, the monitoring bodies have pro-actively

interpreted civil and political rights and crafted an effective normative jurisprudence in favour of the justiciability and enforcement of same. This, of course, is in recognition of the inter-relation and indivisibility of all categories of human rights. It is important then that states should seriously consider constitutional reform to entrench, make justiciable and enforce social rights in compliance with universal human rights aspirations and values.

Chapter **Sixteen**



The Polemics of Summary Trial Procedure under Section 157(1) of CPC

A.I. Ityonyiman, Esq*

Introduction

Criminal Procedure Code is an adjectival law prescribing the mode by which criminal trials and appeal procedures are undertaken to ensure compliance with the rules of natural justice, constitutional fair hearing and general principles of human rights are observed and adhered to.

The code accompanies substantive law on the prescription of what is criminal e.g., the penal code. More importantly, the CPC regulates all criminal trials except where or otherwise expressly excluded by the law creating the offence. This write-up however, is principally concerned with a single strand of the law which provides;

If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by

* Senior Magistrate, Benue State Judiciary.

him and if he shows no sufficient cause why he should not be convicted, the court may convict him accordingly and in that case it shall not be necessary to frame a formal charge.¹

The Nigerian *corpus juris* admits to the adversarial system of justice. This system postulates the principles of ;

- (a) The burden of proof requiring the prosecutor to prove guilt of an accused.
- (b) The presumption of innocence of the accused until the trial judge is convinced beyond reasonable doubt of his guilt.
- (c) The standard of proof by the prosecutor in criminal trial is prove beyond reasonable doubt.

This, unlike what obtains in continental countries, the Scandinavian, oriental countries led by France, most of the old soviet union states who until the embrace of the American style of presidential democracy practised the inquisitorial system.

The main feature of the inquisitorial system is the absence of the presumption of innocence. It is still their law that the prosecution must prove facts, but such proof is not until the accused has stated his defence. The beauty of the inquisitorial system on the part of human rights and the administration of justice is that motive replaces morality for their actions.

The above statutory provision fashions out a summary conviction of an accused who makes a clear cut admission of a set of facts synchronised with the elements of the offence he is said to have committed. The quick dispensation of justice is enhanced where it is carefully employed. The reverse is that justice may not be done but rather assassinated where a wrong approach is adopted. It is

¹ See Section 157(1) of the Criminal procedure Code Cap 51 Laws of Benue State 2004.

therefore a veritable tool to promote the quick dispensation of justice, yet a 'killer on the rampage' on the converse.

This write-up examines the why and how of the application of summary trial under the criminal procedure code. It concludes that summary trial procedure should be directed towards attaining rather than assassinating justice.

Philosophical Basis

The philosophy behind this principle of criminal justice is to put into effect a simple and summary adjudicatory trial procedure for the purpose of quick dispensation of justice. To put it succinctly, it aims at summary conviction of an accused who makes a clear-cut admission to a set of facts that carry all the elements of the offence he is said to have committed.

It is by no means an attempt or an avenue to avoid the rigours of a full trial. That may not be the immediate and central concern of the law which either in summary or full trial is to ensure that those who violate or are in conflict with the law and are brought to justice, are convicted if proved guilty. This is buttressed by the new vogue in plea bargaining and negotiated sentencing system – e.g., the Economic and Financial Crimes Commission, the Lagos ACJL. The violation can only lead to conviction if the guilt is established. The summary trial procedure has not in anyway enthroned a short-circuit system that will toy with or jeopardise the liberty of an accused. Neither is it a short cut to side track the procedural rituals and litany in a criminal trial.

Modus Operandi

Section 157(1) of the criminal procedure code is employed, where section 156 of the same code has been complied with. It is better understood when taken together with section 156. For avoidance of doubt section 156 of the code² provides;

when an accused person is brought before the court the particulars of the offence of which he is accused, shall be stated to him and shall be asked if he has any cause to show why he should not be convicted.

What amounts to particulars of the offence? In the criminal procedure code, the particulars of the offence are those particulars contained in the First Information Report of complaint or other information which must disclose an offence.³

The information or complaint fits into 'particulars' of an offence only when an offence is disclosed.

Case law interpretation of particulars of the offence transcends those 'particulars' contained in the First Information Report. Thus in *Mohammed El-Idrisu v. COP*,⁴ The appellant was taken before a magistrate on a First Information Report alleging that he had driven a motor car without due care and attention. The information read:

Nature of Information – Driving without due care and attention contrary to section 21 of the Road traffic law. PC 21251 Silas Ibiloma of MTD Kano complained that you Mohammed El-Idrisu of Philip Morris (Nig)

² Criminal Procedure Code Laws of Benue State Cap. 51.

³ see *Garba v. COP* [2009] All FWLR (pt. 384) 260,2773 see *Garba v. COP* [2009] All FWLR (pt. 384) 260, 277.

⁴ [1973] NMLR 467.

Ltd. Zaria drove a land Rover Reg. No. LN41 along city road on the 12th June 1973 about 1150 hrs without due care and attention and thereby hit a vehicle with reg. No. KAD 7488.

It was on record that FIR was read and explained to the accused who replied: "The information is true. I agree that I drove without due care and attention. I understood what you explained to me." In effect appellant admitted that he had driven without due care and attention and indeed showed no cause why he should not be convicted. The Chief Magistrate sentenced the appellant to imprisonment for six (6) months following the summary conviction procedure set out in section 156 and 157 of the criminal procedure code.

On appeal it was held that the Chief Magistrate did not comply with the requirement of this section by stating the particulars of the offence to the appellant. That there are very many ways in which a person can drive without due care and attention to wit: driving too fast, driving on the wrong side of the road, failing to stop at a major road etc., and such particulars must be given to the accused person before he can be convicted of an offence under section 21 of the Road traffic law. In *Garba v. COP*⁵ the Information Report against the appellant read:

On 13/7/2002 at about 1300 hrs the DPO, Kakuri Division, Kaduna transferred a case of criminal conspiracy, forgery and theft of money to the CID stating that sometime on 19/2/2002, one Mr. Anthony Amiabu M of Security Dept. Peugeot Automobile Company Ltd (PAN) Kaduna reported that on the same

⁵ *Supra* p. 269.

date, it was discovered that one Joseph Dashe M an employee of PAN Nigeria Ltd. Kaduna conspired with one Yahaya Garba a staff of Kaduna State Water Board HQ. Kaduna, forged some water bills in the name of PAN Ltd. Kaduna amounting to N336,763,00, instead of N41,580.00 which was officially approved by the Head of Admin PAN Ltd Mr. Abdullahi Ohjele. As a result a cheque of the sum of N336,673.00 was raised and issued for the purpose of settling water bills. Thereafter the excess of N295,183.00 was diverted and shared by Joseph Dashe and Yahaya Garba respectively contrary to sections 97, 364 and 287 of the Penal Code Law.

After the First Information Report above was read and explained to only the 2nd accused/appellant, he confirmed that the information was true. The learned Chief Magistrate convicted and sentenced the accused to six months imprisonment or N10,000 fine. His appeal to the High Court failed. On a further appeal to the Court of Appeal, it was contended that there was nothing on the records or the FIR to show that the particulars of the various offences with which the appellant was charged were stated to him so as to justify the conviction. It was held that there was no indication whatsoever in the particulars of the offence as to who raised or caused to be raised the said cheque and who issued or caused to be issued and that was therefore in contravention of section 156 of the CPC.

It is a requirement of the law that particulars of the offence must reveal such details as to the specific act the accused did that gave rise to the alleged offence.

This is premised on the principle of fair hearing created in section 156 that the first step is to read and explain to the accused the particulars of the offence of which he is accused.

After the above procedure, the stage is then set to elicit information from the accused. It is in respect of such a reaction that the court is enjoined to put into effect the summary provisions without the formal charge.

By the combined effect of Sections 156 and 157 of the Criminal Procedure Code, the procedure for summary trial is provided whereby a person brought before a court upon First Information Report (FIR) may be convicted without hearing evidence or framing a charge if certain conditions are satisfied. The conditions are:

- That the particulars of the offence must be stated to the accused;
- That the accused admits that he has committed constituents of the offence;
- That the accused is asked if he has any cause to show why he should not be convicted;
- He shows no sufficient cause why he should not be convicted.⁶

It follows from the foregoing that conviction is contingent upon admission of the offence and failure to show sufficient cause why an accused should not be convicted. The questions of admission of the essential ingredients of the offence and showing no sufficient cause must be satisfied before there can be conviction of such an accused.⁷

⁶ Garba v. COP *supra* p. 276-277.

⁷ See Halilu v. COP [1970] 2 All NLR 178.

Admission as one of the pillars of Summary Trial

What amounts to an admission in this context? It is defined as statement oral or documentary which suggests and inference as to any facts in issue or relevant facts which is made by any of the persons.⁸ To warrant conviction, the explanation of the accused must amount to a complete admission and no more. A clear cut admission of a set of facts that carry all the elements of the offence he is said to have committed.⁹

A veiled admission, denial of responsibility and an explanation any other way is no admission in the eyes of the law. In such circumstance, the magistrate must proceed to take evidence.¹⁰ In *Okpala v. COP*¹¹ there was an appeal against conviction and sentence of the appellant by an Otukpo Senior Magistrate's Court for the offence of theft contrary to section 287 of the Penal Code secured under the summary trial procedure of section 157(1) of the Criminal Procedure Code. The following is what transpired at the trial:

Court:- The Information Report was read and explained to the accused.

Particulars were:

Theft punishable under section 287 of the Penal Code. On June 17th, 1983 at about 1445 hours, one Daniel Aku of Lower Benue River Basin Development Authority Makurdi came to the station and reported that one Samuel Okpara had stolen a Peugeot 504 saloon car registration No. FGN8051A valued

8 See section 19 of the Evidence Act Cap E14 Laws of the Federation of Nigeria 2004. See also *Ogunaike v. Ojayemi* [1987] 1 NWLR(pt. 53) p. 760.

9 *Okpala v. COP* (supra) p. 46

10 *Okpala v. COP* (supra) p. 46.

11 *Okpala v. COP* (supra) p. 47.

at N10,000 - the property of the Federal Government of Nigeria which he parked at 1 Federal Road Otukpo on the night of June 16th-17th, 1983.

Accused:- I understand.

Court:- Can you show cause why you should not be convicted?

Accused:- The vehicle was rescued from me with a boy who was convicted. He gave me the vehicle. They brought it to me in Gboko.

Court: I am not satisfied with your plea. The boy convicted said you gave him the vehicle. You are therefore summarily convicted under section 287 of the Penal Code in accordance with section 157 of the Criminal Procedure Code.

Allowing the appeal, the High Court per Idoko and Eri, J.J., held that there was no clear admission of guilt by accused but an explanation denying responsibility, the duty of the lower court was to take evidence and proceed to full trial.

In Okpara's case, the High Court was of the view that the plea of the accused amounted to a denial of responsibility which required a full trial.

In *Akpayi Usman v. Environmental Sanitation*¹² the appellant was dragged to an Environmental Sanitation court for the offence of conducting vulcanising business during sanitation hours contrary to section 9(iv) Act 2005. Information was said to have been read to the accused who pleaded as follows:

Accused: My children took my engine to the work place so when I went there to retrieve it, I was arrested.

Court: The accused is (sic) find guilty and convicted under

¹² Unreported Appeal No MHC/11A/2010 of 16th December, 2010.

section 24 Environmental Sanitation Authority Law 2005. He is sentenced to N1000 or two months imprisonment.

After conviction and sentence the following dialogue between prosecutor, accused and the court ensued.

Prosecutor: The accused is fighting members of the Task Force as he is sentenced to pay a fine.

Accused – I did not fight.

Court: The accused is found guilty of court contempt for fighting with members of the Tasks Force in the court. He is sentenced to four months imprisonment.

The Makurdi High Court on appeal per Kaka'an & Ejembi J.J., in faulting the conviction held:

...the conviction and sentence of the appellant was certainly it would appear based on his plea of guilty under section 157 of the Criminal Procedure Code but the appellant did not plead that he was guilty and even if from what he said it could be inferred that he pleaded guilty, the plea was equivocal. Therefore it was wrong of the learned Magistrate to claim to have convicted him summarily. And then came the allegation from the Task Force that appellant fought to which allegation the appellant flatly denied...

In scene one, the accused denied conducting vulcanising business during sanitation hours. He equally put up a denial in scene two of his trial over the allegation that he fought members of the Task Force.

13 See *Alechenu v. COP* [1982] 1 NLR 100., 107.

14 *Alechenu v. COP* (supra) p. 102.

Showing Cause as the Second Pillar in Summary Trial

How does an accused show sufficient cause in a summary trial in the eyes of the law? Any explanation by an accused in such circumstances which goes even very slightly or minutely to show that there is no express admission suffices.¹³

It is immaterial that the explanation fails to satisfy the magistrate in his expectations because the accused has no duty to satisfy the magistrate that he did not commit an offence.

In *Alechenu v. COP*¹⁴ the appellant was brought before the Senior Magistrate's Court Otukpo on a First Information Report alleging criminal breach of trust contrary to section 314 of the Penal Code. The necessary part of the information read:

On November 26th, 1981 at about 1415 hours one C.I. Ogah of the Local Government Office, Otukpo came to the station and reported that on November 25th, 1981 at the Local Government Office he entrusted a Peugeot 504, registration No. BNLG5017T, valued N7,800 to Peter Alechenu and on November 26th 1981, Peter Alechenu, of No. 48 Upu Road, Otukpo, reported that the car had been stolen by an unknown person or persons S.314 of the Penal Code suggested.

Court: The First Information Report was read and explained to the accused.

Accused: I understand the allegation against me.

Court: Can you show cause why you should not be convicted under S.157 of the Criminal Procedure Code.

Accused: On November 26th, 1981, I was the driver of the vehicle BNLG 5017T, in which we went to Yangede for official duty. We returned to Otukpo at about 7.30 pm. I drove to Councillor Adole's house and he ordered me to

go and drop the other officer in the G.R.A. After doing so I went back to Councillor Denis Adole and told him I had a fever and he gave me N1 to buy some medicine. I drove straight to my house because the fever was worrying me. I parked the car in my compound after getting some treatment. At about 1.45 am. I heard the sound of the vehicle and I opened the door and discovered that the vehicle had been stolen.

Court: Where did you usually park the vehicle after official duties and how long have you been a driver with the Otukpo Local Government Authority?

Accused: I usually park at the Otukpo Local Government Authority Secretariat after official assignments. I have been a driver with the Otukpo Local Government Authority for over one year now. This was the first time I parked this car in my compound. I did not get anyone to see that the car was not stolen.

Court: The accused acted most negligently by failing to park the car where he had usually parked it for over one year. He is aware of how rampant car theft is all over the state and in Otukpo town in particular. The cause the accused has so far shown amounts to an admission of his offence. This is because of (a) his failure to park the car where he usually parked it at Otukpo Secretariat; (b) failure to get someone to look after the car when he was unable to drive the car because of a fever; (c) failure to get someone to go and park the car at the Otukpo Secretariat , or even to send someone to inform the councillors, or councillor, or the complainant, as to why he could not drive the car back to the Secretariat. I am therefore not satisfied by the cause shown by the accused in this case

15 See Mohammed v. COP [1967] NMLR 83,87.

as it amounts to an admission. I therefore convict him summarily under S.157 of the Criminal Procedure Code, because he breached the trust reposed in him. (Emphasis supplied).

The learned senior magistrate after thus convicting the appellant proceeded to sentence him to “three months” imprisonment without the option of a fine.

Punishment

A smooth sail through summary trial proceeding can still be vitiated by high handedness in the award of penalty. The trial magistrate must advert his mind to the provisions of the law governing summary conviction. The law envisages a limited sentence.¹⁵

The Criminal Procedure (punishment on conviction) order 1966, applicable to Benue State fixed the maximum penalties on conviction under section 157 as follows:

Chief Magistrate: two years' imprisonment and N400 fine
Magistrate Grade I: One year's imprisonment and N200 fine
Magistrate Grade II: Nine months imprisonment and N100 fine
Magistrate Grade III: Three months' imprisonment and N60 fine.

Punishment is therefore another yardstick in measuring the correct application of the summary trial procedure. It is very easy to veer off either in the trial or award of punishment. The High Court has had cause to quash proceedings for reasons of excessive and outrageously arbitrary punishment. That is, punishment meted out without due regard to the provisions on punishment for summary conviction. For instance in *Nenge*

16 See unreported suit No VHC/30m/2005.

Aba v. Registrar CMC Adikpo & Anor. an Adikpo Chief Magistrate had sentenced the accused who stood trial before it for the offences of driving without due care and attention and operating without a driver's license. The trial Magistrate had sentenced the accused to N8000 on each count and the total fine amounted to the sum of sixteen thousand Naira. The High Court Vandeikya did not waste time in quashing the proceedings via an order of certiorari.¹⁶

Challenges, Problems Associated with the Procedure

The summary trial procedure is advantageous in the quick dispensation of justice. Be that as it may, it has its drawbacks. Where the trial court embarks on the procedure, it is bound to mete out punishment governing it. It cannot award maximum punishment as if it were a full trial. Even in very serious offences like kidnapping which carries with it an imprisonment term of ten years, the court may have no alternative than have recourse to the Criminal Procedure (punishment on summary conviction) Order 1966 referred to in the course of this article. Not many people may appreciate the predicament of the trial court in this regard. As a way out, a case is made for a full trial instead of the summary trial as the tendency of resorting to that limited sentence may not meet the justice of the matter. The procedure is also anathema to the concept of presumption of innocence as enshrined in section 36(5) of the Constitution¹⁷ "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty."

¹⁷ See section 36(5) of the Constitution of the Federal Republic of Nigeria 1999.

¹⁸ Price – Retrograde Legislation in Northern Nigeria 24 Modern Law Review at 610 [1961].

The summary trial procedure requires, the admission by the accused. The invitation to the accused to make an admission is like shifting the burden to the accused to prove his guilt.

Showing sufficient cause is akin to calling upon the accused to establish his innocence. That would seem to fly in the face of the accusatorial or adversarial system of justice which requires the state to prove its case against an accused person.

Commenting on ss. 156 and 157, Price¹⁸ said:

it appears that the golden thread of British Criminal Justice Act it is for the prosecution to prove its case and not for the accused to prove his innocence, has been completely broken.

Niki Tobi¹⁹ submitted:

What is material and important is the unorthodox legal task given to the accused to show cause why he should not be convicted. The very moment the accused is addressed in that way, there is the presumption that he is guilty of the offence for which he is charged, and that the onus is on him to prove the contrary. In that respect, the provisions of sections 156 and 157 are inconsistent with the constitutional guarantees. It is hoped that the Supreme Court will have an opportunity to examine the provisions in the light of the Constitution.

19 Criminal Procedure & Evidence in Nigeria 2nd ed. [Lagos, 1977].

The foregoing arguments have some force in them. To call upon an accused to satisfy the court as to why he should not be convicted is tantamount throwing upon the accused the burden of convincing the magistrate that the accused is innocent or knows nothing of the allegation against him. That would occasion a miscarriage of justice much more than enhance the quick dispensation of justice.

On the part of the convict we have challenges of ill advice and second thought. For instance if an accused is aware of the repercussion of an early plea he may refrain from making an admission. In the same vein the capacity of the prosecution is put to task when it comes to full trial. Lastly, summary trial may not be applicable to certain offences for instance capital offences.

Conclusion

The summary trial procedure may be a veritable tool in the quick dispensation of justice, it rubs on the presumption of innocence; its misapplication may work injustice and the failure to follow the form of liturgy and ritual in the conduct of the ritual or the proceeding will assassinate justice rather than do it.

Chapter **Seventeen**



An Appraisal of the Liability of Employer for wrongful Termination/Dissmisal of his Employee under Nigerian Law

Dr. E.A. Kenen*

Introduction

The contractual relationship between employer and employee may be determined by either of the parties. In doing so however, the parties must ensure that they comply with the terms and procedure guiding their contract of employment. We are, however, concerned here with the determination of the contract of employment by the employer. The nature of the contract of employment may either be one with a statutory flavour in which case, the determination of such contract must also be in accordance with the provisions of the statute or the contract may be one regulated by the common law rules of master and servant in which case the rules must be followed particularly with regards to the notice to be given. In either of these two instances, where the provisions of the statute or the procedure is not followed, such determination is deemed to

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be wrongful. It is against this background that this chapter critically examines the liability of the employer in such circumstances with the view to ascertaining the adequacy or otherwise of Nigerian law on the subject.

Distinction between Termination and Dismissal

Termination and dismissal are the different ways in which a contract of employment may be determined. But is there any distinction between the two concepts? According to Black's Law Dictionary,¹ 'Dismissal' means to release or discharge a person from employment. Termination of employment on the other hand has been defined as the complete severance of an employer employee relationship.²

The above definitions have not assisted in bringing out the distinction between the two concepts. The Supreme Court's pronouncement on the issue even creates more doubts and confusion as to the effect of the two concepts. In *Olaniyan & Ors v. University of Lagos & Anor*,³ Oputa, JSC in an effort to define 'dismissal' and its resultant effect stated:

Another fault with the passage of the Learned President (of the C.A) quoted above is that it tends to equate dismissal with loss of benefit. That is not correct. What constitutes dismissal in any particular case will ever remain a question of fact. In law however, dismissal means such act or acts on the part of the master as amount to a repudiation by him of the essential obligations imposed on the servant by the contract. Thus a man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract

1 Garner, B.A (ed). Black's Law Dictionary, 17th edn, (USA: West Group, 1999) p.482.

2 Ibid at p. 1482.

3 [1985] A NLR 363, 391 392; [1985] 2 NWLR (pt 9) 599.

of employment. Loss of benefit is not at the root of dismissal but repudiation of the servant's obligations under the contract is. Once there is that repudiation by the master, then there is dismissal or termination or removal it does not matter which expression is used, the effect is the same. (emphasis supplied).

The above pronouncement of the Supreme Court seems to be saying that there is no distinction between dismissal and termination. However, the same court had earlier taken the view that: "dismissal is not without its stigma and carried infamy and deprives one of benefits which termination of appointment which retirement does not. The term does not apply to termination of appointment with retirement benefits".⁴

When Oputa, J.S.C. therefore, pronounced in Olaniyan's case that whether an employee's employment is determined by dismissal or termination, the effect is the same, it has been submitted,⁵ and we agree with the submission that the pronouncement should be taken as illustrating only the factual effect of repudiation of the contract by the master and not the legal consequences as illustrated by the cases in footnote 4 above.

It is therefore submitted, in agreement with the cases in footnote 4 that the fundamental difference between dismissal and termination is that while in the former, there is loss of benefits, in the latter there is no such loss.

⁴ *Irem v. Obubra District Council* [1960] 1 NSCC 16 at 18; *Usen V.B.W.A. Ltd.* [1965] 1 ALL N.L.R. 224.

⁵ Emiola, A. *Nigerian Labour*, 3rd edn, (Ogbomosho: Emiola Publishers Ltd., 2000) p. 115.

Wrongful Dismissal/Termination of Master/Servant Relationship

Generally speaking, the master can terminate the contract with his servant at any time and for any reason or for no reason at all and once the required notice is given, the employee cannot complain of wrongful dismissal. Thus in *Nwaokoro v. Sapele Urban District Council*⁶ Bairamian, J.S.C. delivering the lead judgment held:

If a master gives his servant a week's notice orally and tells him it is because he is lazy, he may feel that he did not deserve the epithet and ought not to be discharged but cannot complain that he was wrongfully dismissed. So, too if the master gives notice in writing and adds that the servant is lazy and idle, the servant need not show the letter to anyone.

Kutigi J.S.C.⁷ (as he then was), emphasizing this general powers of the master to terminate the contract of employment said:

Generally speaking, a master can terminate the contract of employment with his servant at any time and for any reason or for no reason at all, provided the terms of the contract of service between them are complied with. The motive which led an employer to lawfully terminate his servant's employment is not normally a relevant factor and the court will have no business with such motive...

The irrelevance of motive stated above is indeed an unfortunate position of the law. It is suggested that the Supreme Court

6 [1965] 1 ANLR 234 at 237.

7 Fakuade v. OAUTH [1993] 5 NWLR (pt 291) 47 at 58.

should reconsider its pronouncement and always take into consideration the motive behind each termination.⁸ Chianu⁹ has submitted that such rule is too artificial to be of authority in our times, in a society founded on social welfare and justice and we concur. In Japan, the courts always insist on good faith and reason coupled with due process. In fact a dismissal (including termination) which is not objectively reasonable and socially appropriate is regarded as an abuse of the right to dismiss and as such null and void.¹⁰ In India, the courts insist that an impugned discharge of employment contract must be effected in the bona fide exercise of the power conferred by the contract.¹¹

This attitude of the Nigerian courts with regards to reason for termination is in total disregard of the International Labour Standards. Article 4 of ILO Convention¹² provides that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking, establishment or service."

Even in the Franco-Phone African countries of Benin, Chad, Congo (Brazzaville), Mauritania, Niger and Senegal, termination

8 A number of writers have stated this position of the law without a word of criticism. See for example the following: Idubor, R. "How Protected is the Employment of the Nigerian Worker" [2000] 12 *African Journal of International & Comparative Law* p. 128; Uvieghara, B.E. *Labour Law in Nigeria* (Lagos: Malthouse Law Books, 2001) p. 60.

9 Chianu, E. *Employment Law* (Lagos: New Systems Press Ltd., 2006) p. 306. We hereby acknowledge the immense contribution of Chianu in this area.

10 Schregle, J. "Dismissal Protection in Japan" [1993] 132:4 *International Law Review* p. 507; Suyeno, K. *Japanese Labour Law* (Tokyo: University of Tokyo Press, 1992) p. 401.

11 See *Assam Oil Co. V. Industrial Tribunal* [1960] 1 LLJ 587 (SC). See also Prasad, D. "Re instatement and Labour Law" [1965] 7 *Journal of the Indian Law Institute* 27 at 35.

12 International Labour Organisation Termination of Employment at the Initiative of the Employer Convention No 158 of 1982. The writer has not come across any decision where a Nigerian Judge has referred to this Convention, not even the National Industrial Court.

of any contract of employment, regardless of the party taking the initiative, must be notified in writing and the notification must specify the grounds for termination.¹³

The courts have even gone further to state that reasons such as malice, caprice, bad faith and injured feelings of the plaintiff are not relevant. Thus in *Strabag Construction Nig. Ltd. v. Adeyefa*¹⁴, Edozie, JCA stated:

The matter of termination of appointment of a servant revolves upon contract relationship in law, that is, the contract governing the appointment. Thus, in such cases of termination of appointment, the circumstances in which the employment was terminated, such as reasons for the termination like malice, caprice, bad faith, the injured feelings of the plaintiff or the inconveniences he may have suffered are irrelevant and cannot be taken into consideration, so long as the termination is in accordance with the terms of the contract.

However, where an employer decides to give reason for termination, such reason must be plausible and cogent to justify termination. In *Angel Spinning & Dyeing Ltd v. Ajah*,¹⁵ Omage, JCA stated:

An employer does not owe any obligation to retain the services of any unwanted employee, and may terminate the appointment of the employee without

13 Visisombat, K. "Individual Employment Contracts in New Labour Codes of French Speaking Africa" [1968] 18 International Labour Review p 121 at 136; See also Cumberbatch, J. "The Termination of Employment Statutory Reform in Guyana" [1998] 23 West Indian Law Journal p. 9.

14 [2001] FWLR (pt 60) 1538 at 1562.

15 [2000] FWLR (pt 23) 1332 at 1352.

any reason as he is not bound to be saddled with an unwanted staff. However, where an employer states a reason for the termination, such reasons must be plausible to justify such termination of the appointment of the employee.

It can therefore be seen that once the required notice is given, the employer can terminate the employee's employment and such termination will be lawful. However, if the employer terminates in a manner not specified by the contract of employment, it amounts to wrongful termination and the employer is therefore liable to pay damages.

But before we look at the issue of damages, we will briefly look at the thorny issue of fair hearing particularly in private employment as well as those on contract appointment in public service and employees on probation. Employees who are on contract i.e., employed for a fixed term, the judicial attitude is that they cannot insist on procedural fairness before they are removed. In *David Osuagwu v. Attorney General, Anambra State*¹⁶ the appellant, a lecturer in Anambra State University of Technology employed on contract, was removed from office without a hearing. She challenged the termination, seeking for reinstatement. The Court of Appeal held that she was not entitled to fair hearing. Awogu JCA stated that: "A faithful servant may well want to know why he was being sacked without being given a hearing. If his contract of service does not so provide, his being told is a privilege, not a right".¹⁷ The same attitude is extended to public employees on probation. Shyllon¹⁸ subscribes to this view by stating that "Leaving aside

15 [2000] FWLR (pt 23) 1332 at 1352.

16 [1993] 4 NWLR (pt 285) 12.

probationary appointments, a university cannot dismiss a member of its academic staff for misconduct without complying with the rules of natural justice". But Shyllon's position has been criticized by Inegbedion,¹⁹ who maintains that probationary employees are entitled to hearing before dismissal. An English writer also argues in a similar manner.²⁰

In employment regulated by common law rules of master and servant, so long as a termination accords with the terms of the contract of employment, an employee is not entitled to a fair hearing prior to the termination of the relationship. Thus in *Olanrewaju v. Afribank Plc*,²¹ an employee, whose appointment was terminated by giving him 3 months' salary in lieu of notice sued contending that his termination was wrongful as he had not been given a hearing. Katsina-Alu JSC (as he then was) held that "an employee can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation". However, where an employee is removed on ground of misconduct, the Supreme Court insists on fair hearing.²²

The attitude of Nigerian writers as far as private employers are concerned has not been helpful in pushing for a change of judicial attitude in this regard. Most of them insist that as far as master-servant relationship is concerned, an employee can

17 The writer also had a similar experience in the case he personally handled. See *Polycarp Iber v. University of Agriculture, Makurdi* [Unreported]. Suit No. FHC/MKD/CS/03/2008. Judgment delivered on 22/7/08.

18 Shyllon, F. "Natural Justice for Sacked Professors and Rusticated Students" [1990] 2 *Ibadan University Law Review* 28 at 35.

19 Inegbedion, N.A. "Contending Legal Issues in the Determination of Public Employment" [1994] 4, *Edo State University Law Journal* 69 at 80 - 83.

20 Thomson, J.M. "Unfair Dismissals and Employees on Probation" [1973] 36, *Modern Law Review*, 647.

21 [2001] 72 *FWLR* 2008 at 2018.

22 [2001] 72 *FWLR* 2008 at 2018.

not insist on fair hearing before he is removed.²³ However,²⁴ Inegbedion suggests that unless a contract of service expressly excludes the rule of natural justice, an employee may not be removed from office unless he is given a fair hearing. His position is to be preferred. Emiola,²⁵ improving on Inegbedion's position argues that in view of the constitutional provision of fair hearing, coupled with the common law rules of natural justice, any determination of procedural contract without procedural fairness should be declared invalid. Okpaluba²⁶ is of the opinion that whether or not an employee should be afforded the right to fair hearing before his appointment is terminated is dependent upon whether the right is a term of employment contract. It has been submitted that there is no reason why the right to fair hearing should be accorded to employees summarily dismissed for misconduct but denied to those whose employment was terminated on notice through no fault of their own.²⁷

In the United States of America, employers' power to terminate at will without fair hearing is checked by implying the right into the contract having regard to the practice of the industry

24 Inegbedion op cit at 69.

25 Emiola, op cit 88 - 92.

26 Okpaluba, C. "A Trade Union's Right to Dismiss: A West Indian Decision" [1973] 22 *International & Comparative Law Quarterly* 557 at 563.

27 Grogan, J. "Dismissals into Public Sector: The Triumph of Audi?" [1991] 108 *South African Law Journal* 599 at 600. See also Grogan, J. "Natural Justice and Employment Contracts: A Rearguard Action" [1992] 109 *South African Law Journal* 186. This is in contrast with the conservative view of Elias who urges employers to use the device of termination to shut employees out of the need for pre-dismissal hearing. Elias, D. "Summary Dismissal Upon Allegation of a Crime An Over View" [2000] 4 (No 3) *Modern Practice Journal of Finance & Investment Law* 134 at 145.

or of the company, that the employee received commendations or promotions, and longevity of service.²⁸

Even with regards to students, almost all common law jurisdictions have recognised that students are entitled to a fair hearing before disciplinary actions are meted out to them.²⁹ Even before rustication for a limited period is imposed, elementary principles of natural justice must be observed. In *Central Council for Education & Training in Social Work v. Edwards*,³⁰ a student was refused admission to a polytechnic without being afforded a hearing or being given reasons for the refusal. The court held that he was entitled to a fair hearing as the polytechnic was under a duty to act fairly because the refusal could seriously affect the applicants' career. If fair hearing is accorded students, the writer wonders why the courts do not accord same to employees whose appointments are governed by the ordinary common law rules of master and servant. It has even been submitted³¹ that an employee invests his 'asset' in a particular job, that when he is deprived of that asset through no fault of his own, he should be compensated and that he should not lose his 'asset'

28 See Pitt, G. "Dismissal at Common Law: The Relevance in Britain of American Developments" [1989] 52 *Modern Law Review* 22 at 27. The writer handled a case where an employee, who had been commended five months earlier suddenly had his contract appointment terminated without any reason and fair hearing, yet the Federal High Court upheld the termination as being lawful. See Polycarp Iber v. University of Agriculture, Makurdi [Unreported] Suit No FHC/MKD/CS/03/2008. Judgment delivered on 22/7/08.

29 See generally the following articles: Seavey, W.A. "Dismissal of Students: Due Process" [1957] 70 *Harvard Law Review* 1406; Emiko, A.A. "Comparative Discourse on Students' Fair Hearing in Two Jurisdictions USA and Nigeria" [1991] 2 (No 4) *Justice*, 127; Essien, E. "Fair Hearing and University Discipline: An Appraisal" [1991] 2 (No 6) *Justice*, 51.

30 *The Times*, 5 May, 1978 noted with approval in Baxter, L.G. "Fairness and Natural Justice in English and South African Law" [1979] 96 *South African Law Journal*, 607 at 622.

31 Rubenstein, M. "Dismissals and the Law: Britain and Europe" in Torrington, D. (ed) *Comparative Industrial Relations in Europe* (London: Associated Business Programmes, 1978) 142 at 147.

arbitrarily. This principle is referred to as the employee's property right in his job.

The attitudes of Nigerian courts do not even conform to International Labour Standards. For example Article 7 of the ILO Convention³² provides that the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.³³

Damages to which a wrongfully dismissed or terminated employee is entitled to

In computing damages to which a dismissed or terminated employee is entitled, the courts are guided by two approaches. The first is to award as damages the amount which the employee would have earned had the contract lasted its full time. This is often the case where the parties, by their express agreement, or by necessary implication, stipulate a fixed or ascertainable time when the contract is to come to an end. Thus in *Garabedian v. Jamkani*,³⁴ the court held that the proper measure of damages was the amount of salary which the employee would have earned for the unexpired term under the contract, had the contract not been prematurely determined. But the Supreme Court in *Swiss-Nigerian Wood Industries Ltd. v. Danilo Bogo*³⁵ looked at the issue of damages for the unexpired term under the contract differently. Here,

33 A learned writer had earlier on urged that the Industrial Dispute Settlement Machinery should be in conformity with the ratified International Labour Conventions Yesufu, T.M. "Legal Aspects of Labour Relations in Nigeria (2)" [1965] *International & Comparative Law Quarterly*, (Supplementary Publication No. 10) 94 at 108.

34 [1961] 1 U ILR 177.

35 [1971] 1 U ILR 337.

the contract of appointment was for a fixed period of two years which had been wrongfully terminated after the employee had worked for just four months. The Supreme Court held that such contract, even though wrongfully terminated should not be treated as subsisting until the end of the two year period entitling the plaintiff to salary for the unexpired term under the contract. Furthermore, it held that the damages as awarded by the trial court were not properly constituted. The Supreme Court therefore reduced the damages to N8,400 representing the period of 14 months at a monthly salary of N600. However, the 14 months were not the unexpired term under the contract (as the unexpired term was 20 months) but factors considered were: 7 months for the period the case was pending, 1 month for the plaintiff to decide on his appeal and file same and 6 months for the plaintiff to resettle down for another business. Emiola³⁶ and Worugji's³⁷ conclusion that the Supreme Court awarded the employee his wages for the unexpired period of 14 months does not therefore represent the correct facts of the case. It is submitted that in such circumstances the Supreme Court should have awarded the employee his wages for the unexpired period which was 20 months even though some other writers like Sasegbon³⁸ and Yerokun³⁹ have applauded the judgment.

The second approach is to award as damages the amount of wages which the worker would have earned during the period of notice. Thus in *Gateway Bank of Nig. Plc. v. Abosede*,⁴⁰ Adekeye, JCA stated:

36 Emiola op cit 154.

37 Worugji, INE Introduction to Individual Employment Law in Nigeria (Calabar: Adorable Press, 1999) 150.

38 Sasegbon, F. "Wrongful Dismissal Measure of Damages" [1970] Nigerian Lawyer's Quarterly 2006).

39 Yerokun, O. "Case Comment on Okongwu V. NNPC 1989] 4 NWLR (pt. 115) 296 in [1990] 1:1 Lagos State University Law Journal 83 at 85.

40 [2001] FWLR (pt 79) 1316 at 1337.

In a claim for wrongful termination of employment, where there is a written provision for terminating the contract of employment, and there is a breach of the written provision, what the employee would be entitled to would be the salary for the period of the notice which the employer would have given as notice to the employment of the employee.

Obadina, JCA in confirming the above position of law, stated in *Angel Spinning v. Dyeing Ltd. Ajah*⁴¹:

In ordinary contracts of employment where the terms provide for one month's notice before termination or salary in lieu thereof, the only remedy an employee, who is wrongfully terminated can get is a month's salary in lieu of notice and any other legitimate entitlements due to him at the time the employment was brought to an end.

Where no specific period of notice is stated in the contract of employment, the courts construe what ought to have been reasonable notice. Thus in *Nigerian Produce Marketing Board v. Adewunmi*⁴² the employment was determinable by notice and the Supreme Court held that six month's notice would have been adequate. But an employee wrongfully dismissed may sometimes be awarded more damages than his bare wages. Thus in *Haider v. Berini Nigeria Bank Ltd.*,⁴³ the court awarded lump-sum damages, taking into account wages in lieu of notice, reasonable expenses during the court

41 (Supra) at p. 1342.

42 [1972] 11 SC 111.

43 [1963] 1 All NLR 140.

44 See also G.B. Ollivant & Co. Ltd. v. Agbabiaka [1972] 2 SC 137 at 143.

action, an amount for the period within which the worker could have arranged an appeal, his ticket home and a reasonable time to search for suitable employment.⁴⁴

Can an order of interlocutory injunction be ordered by the court to restrain an employer from removing an employee from office? The Court of Appeal answered this in the negative. In *New Nigeria Bank Plc. v. Udobi*,⁴⁵ Pats-Acholonu, JCA stated:

By the order of injunction...that court was attempting to foist on the employer the services of someone which the company obviously appears no longer interested in his services. That is not done. An order of injunction against an employer at early stage of a case is an inappropriate procedure. It is ungainly and no court should subscribe to such a method of enforcing a complaint in master-servant case when the substance of the case is yet to be determined or merit.

Chianu⁴⁶ has submitted that the remedy may only be available to an employee who has a hint that he is about to be dismissed and he gets to the court speedily, ahead of his letter of dismissal.

45 [2001] 14 NWLR (pt 32) 1 at 10.

46 Chianu op cit p. 540 See also Hughes, A.D. "Wrongful and Unjustifiable Dismissal in the Law of New Zealand Some Proposals for Improvement" [1976] 7 New Zealand Universities Law Review 105 at 121 which suggests that judges can sparingly use injunction to restrain an employer from acting on a purported dismissal which is in breach of contract. See also Carty, H. "Dismissed Employees: The Search for a More Effective Range of Remedies" [1989] 52 Modern Law Review 449 at 468.

47 [2001] FWLR (pt 72) 2008 at 2017 .

Can there be an order of Specific Performance or Reinstatement in Master/Servant Relationship?

Can there be no order of specific performance or reinstatement where there has been a wrongful termination /dismissal of the contract of master and servant governed by the common law rules? The Supreme Court answered this question in the negative. In *Olanrewaju v. Afribank Plc.*⁴⁷, Katsina-Alu, JSC (as he then was) stated that “under master and servant employment, there cannot be specific performance of contract of service”. Furthermore, the Supreme Court, in an attempt to answer the above poser, laid down a distinction between contract of personal service and an ordinary contract of service. Oputa J.S.C.⁴⁸ Stated:

But there is a mighty difference between a contract of personal service and an ordinary contract of service like in Vines case or Shittabey's case. In contract of personal, service personal pride, personal feelings, personal confidence and confidentiality may all be involved all these make it difficult to compel performance of a contract of personal service against an unwilling master. Fortunately in the case on appeal, one is not dealing with a master who is an ordinary human being with pride, feeling etc. The respondents are creatures of the law and the selfsame law will not find it difficult to compel their performance of the contract.

From the above pronouncements, it means that there can be no order of specific performance or reinstatement for wrongful termination/dismissal in contracts of personal service which are governed by the common law rules. But what can also be

48 *Olaniyani v. University of Lagos* [1985] ANLR 363 at 395.

inferred from the pronouncement is that the courts should not be so inhibited where the employer is a corporation and particularly a public limited liability company. A private limited liability company where the owners i.e., shareholders may be few or members of one family, there might still be personal pride, feelings etc., as to prevent an order of reinstatement. However, in public limited liability companies like banks where the shareholders run into thousands, there can be no personal pride, confidence⁴⁹ or feelings and so the court should not hesitate in making an order for specific performance or reinstatement. Ipaye⁵⁰ extends this recommendation to partnerships. It is therefore submitted that the refusal of the courts to order for specific performance or reinstatement in relation to bank employees is not in accord with the spirit of the Supreme Court's pronouncement in Olaniyan's case.⁵¹ The impression given by Nigerian judges is that reinstatement as a relief cannot be granted in employment governed by the master/servant relationship. However, the common law does not seem to support the position of Nigerian judges. Thus in the famous case of *Hill v. C.A. Parsons & Co. Ltd.*,⁵² Lord Denning, MR in a well considered judgment held that the employee was entitled to reinstatement as the case was an extra ordinary one because damages would not have been adequate compensation for loss of his pension rights. While Howells⁵³ does not see anything wrong with the judgment,

49 See the views of Benedictus to the effect that emphasis should be on the need for subsisting confidence between employer and employee rather than the individualistic view of contract of employment.-Benedictus, R. "Repudiation of Employment Contracts" [1979] 95 Law Quarterly Review 14 at 17.

50 Ipaye, A. "The Suspended Employer Under Nigerian Law" [1992] Vol 3 Nos 1 & 2 Justice 62 at 68.

51 For instance in *Afribank Nig. Plc v. Obi Nwanze* [1998] 6 NWLR (pt. 533) 283 at 296 Mohammed JCA refused re-instatement because according to him 'specific performance is generally not the remedy in respect of personal service'.

52 [1971] 3 All ER 1347 CA.

53 Howells, RWL "Enforcing the Contract of Employment" [1972] 35 Modern Law Review, 310.

Hepple⁵⁴ is of the opinion that the judgment was reached *per incuriam* and would not endure.

There are various reasons why the courts are hesitant to reinstate private employees; one of which is that it would require the courts to continually supervise the order to ensure that the employee performs his obligations. However such fears have been allayed by a writer⁵⁵ who says the court can wield its weapon of contempt for disobedience to its orders as it is the practice in U.S.A. In fact this hard position of Nigerian judges is not in accord with industrial relations practice. Labour law is being treated as "an arid game played by keen minds in court rooms and academic ivory towers."⁵⁶

Another reason for opposition to reinstatement of an employee is that it does not preclude an employer from dismissing the employee afresh.⁵⁷ However, a research conducted on this in Britain concludes that "It is generally not the practice of management to set a trap for the unwanted employee with the intention of getting rid of him again."⁵⁸

Ross' investigation has also led to a similar conclusion.⁵⁹ In United States of America, a researcher showed that only 4 out of 85 employees were terminated a second time.⁶⁰

54 Hepple, B.A. "Injunction to Enforce Contract of Employment" [1972] A Cambridge Law Journal 47.

55 Clark, G. de N. "Unfair Dismissal and Reinstatement" [1969] 32 Modern Law Review 532 at 537.

56 Wedderburn, K.W. *The Worker and the Law* 2nd edn, (London: Butterworths) 9.

57 See Lewis, P. "An Analysis of Why Legislation Has Failed to Provide Employment Protection for Unfairly Dismissed Employee" [1981] 19:3 British Journal of Industrial Relations 316. See also the case of *Eyutchae V. Nigerian Television Authority* [1986] 5 NWLR (pt. 41) 395.

58 Mc Dermott and Newhams "Discharge Reinstatement: What Happens Thereafter" [1970/71] 24 Industrial & Law Relations Review 526.

59 Ross "The Arbitration of Discharge Cases: What Happens After Reinstatement" in *Critical Issues in Labour Arbitration* 23 - 5.

60 Aspin "A Study of Reinstatement under NLRA" (Unpublished Ph.D thesis, Massachusetts Institute of Technology, 1967) referred to by Williams, K. "Job Security and Unfair Dismissal" [1975] 38 Modern Law Review 292 at 307.

Another reason for withholding reinstatement in master-servant relationship is the argument relating to mutuality which states that the relationship between an employer and his employee is based on confidential relationship which cannot continue to exist in the absence of mutuality.⁶¹ But rather than a blanket prohibition against specific performance of employment contracts because of absence of mutuality, it has been held that "the true principle is that one judges the defence of want of mutuality on the facts and circumstances as they exist at the hearing."⁶² Freeland⁶³ has suggested that extending the mutuality argument to employment contract imposes a purely formal equality between employer and employee which has little to do with the realities of the relationship. Umoh,⁶⁴ in arguing against reinstatement states that it would be contrary to public policy to compel a servant to serve an unwilling master and the courts have never dreamt of enforcing agreements strictly personal in their nature. In support of this view, Akindipe⁶⁵ stated that "wrongful termination of employment, no matter how grievous can only result in damages. Neither the skill of the barrister, nor the eloquence of the plaintiff's pleas, not even the sagacity of the judge has in practice been able to alter this." This type of reasoning, it is submitted is rather conservative and not in tune with the current global trend. In fact, the present reluctance to order reinstatement is evidence of what Kahn-Freund⁶⁶ describes as "the power of a legal shibboleth", retention of old idea not suitable for modern time.

61 See generally "Mutuality in Specific Performance" [1903] 3 Columbia Law Review 1; Cook "The Present Status of the 'Lack of Mutuality' Rule" [1927] 36 Yale Law Journal 897; Spry ICF The Principles of Equitable Remedies 5th edn, (London: Sweet & Maxwell, 1997) 10 - 13.

62 Per Goff, LJ in Price V. Strange [1978] Ch. 337 at 357.

63 Freeland, MR The Contract of Employment (Oxford: Clarendon, 1976) 276 277

64 Umoh, G.A. "Public Service Contracts of Employment: The Current Position of the Law in Nigeria" [1991] 2:5 Justice 90 at 94.

65 Akindipe, S.O. "Notice or Payment in Lieu and the Determination of Contract of Employment" [2003] 7 (No. 3 4) Modern Practice Journal of Finance & Investment Law 414 at 428.

66 Kahn-Freund, O. "Uses and Misuses of Comparative Law" [1974] 37 Modern Law Review 1 at 24.

The better and perhaps ideal position of the law is the principle stated by Wooding CJ of the Trinidad Court of Appeal as a guide to the Industrial Court:

*Reinstatement would be awarded where its award is essential to protect an employee against an unjust or unfair exercise of the employer's right of dismissal; in that respect, the proper test to be applied is: has there been or has there not been oppression, injustice or unfair dealing on the part of the employer towards the employee? In exercising the right to dismiss, has the employer acted unjustly or oppressively?*⁶⁷

It can therefore be seen that the law is very harsh to an employee whose contract is governed by the common law rules.

Can General Damages be Awarded for Employee's Injured Feelings?

One other point is the issue of general damages for an employee's injured feelings arising from a breach of contract. Can general damages other than damages naturally flowing from the breach of contract as was enunciated by Alderson, B. in *Hadley v. Baxendale*⁶⁸ be awarded to an employee whose contract has been wrongfully terminated and particularly for injured feelings? The courts have held that "apart from damages naturally resulting from the breach of an employment contract, no other form of general damages can be contemplated".⁶⁹

67 *Fernandes (Distillers) Ltd. V. Transport and Industrial Workers' Union* [1968] 13 WIR 336 quoted in Chaundhary, R.L. "Compulsory Arbitration and the Industrial Court in Trinidad and Tobago" [1977] 26 *International and Comparative Law Quarterly* 381 at 391.

68 [1854] 9Ex 341 at 354.

69 See *Per Sanusi, JCA in Kabel Metal Nig. Ltd. V. Ativie* [2001] FWLR (pt 66) 662 at 680. See also *Yerokun*, op cit 85.

In support of the above principle, in *Nitel Plc v. Ocholi*⁷⁰ the court stated that “plaintiff in an action for wrongful dismissal is not entitled to general damages because general damages belong to a claim in tort”.

As for the employee's injured feelings, the Court of Appeal in *Strabag Construction Nig. Ltd. v. Adeyefa*⁷¹ stated that

in a case of breach of contract, damages will not be awarded for injury to the employee's feelings, distress, social credit or loss of reputation or for extra difficulty in finding any other alternative employment, resulting from his termination or dismissal.

The above decision used to be the common law position in England which had been criticised by Enonchong⁷² who was of the opinion that since apprentices, advertisers, and owners of goodwill can recover damages for loss of reputation; why should employees be excluded from recovering such?

It should be noted that while the common law position has undergone changes in Britain and now employees can be awarded damages for injured feelings,⁷³ Nigerian Courts still apply the old common law position. It is submitted that Nigerian courts should embrace the current trend at common law. Chianu⁷⁴ suggests that general damages should be awarded against an employer who terminates an employment contract whether in accord with employment contract or

70 [2001] FWLR (pt 74) 254 Per Magaji, JCA at p. 285.

71 [2001] FWLR (pt 60) 1538 at 158 1559 per Ekpe, JCA).

72 Enonchong, N. “Contract Damages for Injury to Reputation” [1996] 59 Modern Law Review 592.

73 See *Malik v. Bank of Credit & Commerce International S.A* [1997] 3 All ER 1.

74 Chianu, op cit at p. 499.

wrongfully should be immaterial. In Germany, the age of an employee is taken into consideration in assessing damages for wrongful dismissal.⁷⁵

Wrongful Termination/Dismissal of Employment with Statutory Flavour

In employment with statutory flavour, any termination or dismissal of an employee must be in accordance with the provisions of the relevant statute. Where this is not done, any purported termination is deemed wrongful. The Supreme Court's position on the remedy to be awarded is specific performance or reinstatement. Furthermore, cases in which the courts can order reinstatement⁷⁶ or specific performance have been extended to cover public and civil servants.⁷⁷ A public servant is an individual employed in any of the public service institutions while a civil servant works in the civil service. These are institutions established or funded principally by the government and the people employed in these institutions are pensionable employees, which means that once their appointments are confirmed, their employment is secured until the retirement age, except for misconduct. Their employment cannot therefore be terminated except in the manner prescribed by the statute and any purported termination not in accordance with the statute is null and void.

75 Clark, G. de N, "Remedies for Unfair dismissal: A European Comparison" [1971] 20 *International & Comparative Law Quarterly* 397 at 420. See also Elmore, R. "The Older Worker and Age Discrimination" [1980] *Journal of Business Law* p. 406.

76 *Olaniyan & Ors v. University of Lagos* [1985] ANLR 363 is the locus classicus on the issue.

77 The courts ordered re-instatement in the following cases: *Shitta Bey V. Federal Civil Service Commission* [1981] 1 SC 40; *Bakare v. LSCSC* [1992] 8 NWLR (pt 262) 641. *Imoloame v. WAEC* [1992] 9 NWLR (pt 265) 376. *UNTHMB V. Nnoli* [1994] 8 NWLR (pt 363) 376.

But in *Iloabachie v. Phillips*⁷⁸ the Court of Appeal held, rather unfortunately that the provisions of a statute that gave power to employ and fix a salary of a staff and tenure of office to an institute cannot be interpreted to contain conditions of service and as such did not confer any legal status on the employees. The court held further that the fact that a person is a pensionable federal public servant does not mean that his contract of employment is protected by statute.⁷⁹ By this holding, the Court of Appeal is, in essence, saying that where an employee is a public servant and in a pensionable cadre, the court must still determine whether the statute specifically contains the terms and conditions of employment of the employee relying on the statute. It has been submitted,⁸⁰ and we are in agreement, that the reasoning of the Court of Appeal is too restrictive and at variance with previous decisions on the point and capable of derailing the progressive vision of the panel of the Supreme Court justices in Olaniyan's case and other cases that followed it.

Unfair Termination/Dismissal

An employee, whose employment is governed by the common law rules is held to be validly removed once proper notice is given. While an employee whose employment is with statutory flavour may be held to be validly removed for good cause and in accordance with the statutory procedure. Once the proper notice is not given or the provisions of the statute as the case may be are not complied with, such termination or dismissal is wrongful.

78 [2002] 14 NWLR (pt 787) 264 at 284 per Tabai J.C.A.

79 See also *Isiewore v. NEPA* [2002] 13 NWLR (pt 784) 417.

80 Erugo, S. "Security of Employment in Nigeria: A Case for Statutory Intervention" [2007] NJLIR Vol. 1 No. 1. p. 57 at 67.

But under the common law rules, the termination of an employment may be lawful without necessarily being fair. But the present position in Nigeria is that the law does not concern itself with the equity of the circumstances. A person may work for an employer for all his youthful and useful years spanning a period of 30 years and yet may have no more right than salary in lieu of notice. Two decisions of the Supreme Court may reveal and illustrate the unfairness and helplessness of the employee in such circumstances.

In *Friday Abalogu v. Shell Petroleum Dev. Co.*,⁸¹ the plaintiff was employed by Shell Petroleum on 3rd May, 1971. His appointment was subsequently confirmed on 3rd May, 1972. Therefore, he became a permanent and pensionable staff of the company. By a letter dated the 25th day of January, 1995, Shell intimated the plaintiff that he was due for retirement from service on the date of the plaintiff's 55th birthday i.e., 3rd August, 1996. However, by another letter dated 31st January, 1995, Shell Petroleum terminated the plaintiff's appointment paying him 3 months salary in lieu of notice in accordance with the terms of the contract of employment. The plaintiff brought an action in the court contending that the purported termination should be declared null and void as he was already due for retirement. His action was dismissed and on further appeal to the Court of Appeal and the Supreme Court, the appellate courts confirmed the decision of the court of first instance. The Supreme Court and those below it held that the relationship of the parties was regulated by the written agreement and the only condition precedent to termination in the letter of appointment was a 3 months notice or payment in lieu. Accordingly, the Shell Petroleum was entitled to determine

81 [2003] 13 NWLR (pt 837) 308.

the contract of service in the manner it did. The court held:

The court in construing the relationship of the parties to a written agreement must confine itself to the plain words and meaning which are derivable from their rights and obligations there under.... Where, as in the present case, a contract contains a provision that either party thereto may determine it by specific notice or payment of prescribed sum of money in lieu thereof, such notice or payment as the case may be must be complied with in strict accordance with the terms of contract. Where, however, the right to determine the contract by notice depends upon the performance of a condition precedent, the party seeking to exercise his right of determining the contract must first establish that the prescribed condition precedent was fulfilled.⁸²

It can be seen from the above that in termination cases, sanctity of contract and freedom of contract are the operative and indeed rationalizing concepts. Before we consider the second case, it must be pointed out that the court's have even gone a step further to hold that where an employee accepts or collects his or her entitlements, which include salary in lieu of notice of termination of employment, he or she cannot be heard to complain later that the contract of employment was not validly and properly determined. In other words, there is foreclosed any talk of unfair termination. Thus in *Agoma v. Guinness (Nig) Ltd.*,⁸³ the court held:

⁸² Ibid at p. 360. It should be noted that in a similar English case of *Hill V. C.A. Parsons & Co. Ltd.* (Supra) Lord Denning held the purported dismissal null and void as the case was an extra ordinary one. Nigerian judges should emulate their English counterparts.

The question is whether the appellant can now maintain this action after collecting her terminal benefits. It is the law that she cannot. She had put paid to any contract, real or imagined which she thought or that she had with the respondent. The contract was completely and validly determined when she accepted her terminal benefits which included her two months salary in lieu of notice.⁸⁴

Happily however, the Supreme Court has modified this ugly trend in cases bothering on unlawful retirement of public servants. Thus in *Military Administrator of Benue State v. Ulegede & Anor*⁸⁵ Karibi-Whyte stated:

The retirement of respondents was therefore not in compliance with the enabling law.... The retirement being unlawful and void, a valid act cannot arise therefrom. Therefore that acceptance of three months salary in lieu of notice cannot in the circumstance preclude the respondents from complaining about unlawful retirement which was void abinitio.⁸⁶

Sholanke⁸⁷ submits that mere acceptance of salary in lieu of notice should not estop an employee from contesting the termination of his employment provided the acceptance is coupled with other acts evidencing a repudiation of the employer's unilateral termination of his contract of employment. Writing on the subject of salary in lieu of notice, Akindipe has rather taken a conservative approach by stating that:

83 [1995] 2 NWLR 672.

84 Ibid at p. 689.

85 [2001] 9 & 10 SCNJ 43.

86 Ibid at p. 61.

87 Solanke, O.O. "Terminating of Contracts of Employment: Are University Lecturers Sacred Cows?" [1991] 2 (No 5) Justice, 136 at 143.

*since principle of legality demands that law be made certain and that there shall not be judicial activism in the arena of law, if the master adheres to the terms of termination procedure as contained in the contract of service, the master cannot be held liable for wrongful termination simply because salary in lieu has been rejected.*⁸⁸

However, with regards to cases bothering on breach of contracts of employment i.e., master-servant relationship regulated by common law rules, the position of the Supreme Court in Agoma's case seems to be still applicable. This is discernible from the pronouncement of Ayoola, JSC. He said:

*There was nothing in the case to suggest that the respondents gave up their right of action by their conduct. Furthermore, the case was not a case of mere breach of a contract of employment but one in which the retirement of the respondents was void because of noncompliance with the provisions of the statute which it was claimed, conferred power on the first appellant to retire them.*⁸⁹ (emphasis supplied).

88 Akindipe, S.O., "Notice or Payment in Lieu and the Determination of Contract of Employment" [2003] 7 (Nos 3-4) Modern Practice Journal of Finance & Investment Law 414 at 429.

89 Ibid at p. 55. But in *Nigerian Telecommunications Ltd v. Ikaro* [1994] 1 NWLR (pt 320) 350 at 364 the Court of Appeal held that the acceptance did not constitute waiver since the respondent, a low-income employee should not be expected to protest on an empty stomach. It seems here that a necessitous person cannot be deemed to be free to exercise a waiver.

The second case is that of *Shell Petroleum Development Co. v. Nwaka*.⁹⁰ Here, the employee was given a notice on the 19th day of December, 1999 and offered voluntary severance, which he described as 'financial bait' of Thirty Million Naira (N30m) if he signed an acceptance on the same day or his employment would be terminated automatically with three months notice. He rejected the offer and was by another letter of the same 19th December, 1991, 'released from the company' as his services were no longer required. Attached to the letter was a cheque being payment in lieu of notice. The employee claimed that he was entitled and qualified to occupy the vacant position of Development Director in the company and could not be so declared redundant in apparent victimization of Nigerians. The Supreme Court held that in the absence of any contractual term to guide it, it would be an unwarranted interference with the freedom of contract for the court to assume jurisdiction to review the decision of the company to redeploy an employee.

The above cases are the classic illustrations of instances where termination is lawful, yet unfair but the courts in Nigeria have not bothered about the equity of the circumstances.⁹¹ It is in such circumstances that it is suggested that there should be statutory intervention to remedy such unfair treatment of employees, particularly bearing in mind that the so called freedom of contract in employment matters is a charade. It is therefore suggested that a legislation regulating unfair termination and dismissal should be enacted which should

90 [2003] 6 NWLR (pt 815) 184.

91 In other jurisdictions where fair Labour Practice has been introduced, the onus is placed on the employer to prove that dismissal (with or without notice) or any disciplinary action is not unfair. See Yemin, E, "Job Security: Influence of ILO Standards and Recent Trends" [1976] 113.1 International Labour Review 17 at 28.

be applicable to both public and private employment, particularly where private employers are corporate entities. In all cases, the courts should be empowered to order specific performance unless it sees reason to hold otherwise. Where the court cannot order reinstatement, it should award damages which may be exemplary, the amount being dependent upon the unconscienability and circumstances of each particular case.⁹² It has been further suggested that the National Industrial Court should be given exclusive jurisdiction on matters of unfair dismissal/termination.⁹³

A trip to the United Kingdom will give an insight into the legislation being suggested. In Britain, the common law position has been statutorily reformed. The reforms started with the Industrial Relations Act, 1971⁹⁴ as amended by subsequent enactment. By the relevant enactment, employees are protected from being unfairly dismissed or terminated provided they have been employed for 12 months, even though there are exceptions. In these cases, the onus of proof is on the employer to show that the reason or if more than one, the principal reason for dismissing an employee falls into one of the categories set out in the Employment Rights Act, 1966. These categories are:

- i. The employee lacked capability or qualification.
- ii. The dismissal was as a result of the conduct of the employee.
- iii. There was a genuine redundancy.

⁹² See *Erugo op. cit* at pp. 70 - 71.

⁹³ *Emiola op. cit* at p. 431. According to him, this will reduce congestion which is a common feature of the High Courts.

⁹⁴ Repealed but re-enacted in schedule 1 of the Trade Union & Labour Relations Act, 1974 and subsequently in Sections 54 - 84 of the Employment Protection (Consolidation) Act, 1978 as amended by Sections 6 - 10 of the Employment Act, 1980.

- iv. The continuation of employment would contravene a statute .
- v. Some other substantial reason.

It is to be noted that unless the employer proves one of the above mentioned categories, the termination of employment will be automatically unfair. It is to be further noted that even if the employer proves that the case comes under one of the above categories, it is up to the employment tribunal (in our case, N.I.C.) to decide 'in accordance with equity and substantial merits of the case' whether the dismissal was fair or unfair. The employment tribunal awards compensation for unfair termination depending on the category.⁹⁵

Conclusion

The employer's liability for the wrongful termination /dismissal of his employee has been discussed in twofolds: (a) employment with statutory flavour and (b) employment governed by the common law rules of master and servant. In the former, Nigerian law offers, to some reasonable extent, protection to a wrongfully dismissed/terminated employee by way of providing the ultimate and desired remedy of reinstatement in appropriate circumstances. In the latter, the law is very harsh to the employee and the position of the law in this area is inadequate and generally unsatisfactory. It is therefore recommended that there should be a legislative intervention in the manner prescribed herein before with the view to guard against the employer's arbitrary and unconscionable termination/dismissal of his employee and/or a change of judicial attitude in line with what is obtainable in other jurisdictions. This way,

95 <http://www.employmentlawsolicitor.co.uk/unfair.html> of 12/11/06.

the Nigerian worker will be adequately protected against the employer's arbitrary and unconscionable termination/dismissal.

Chapter **Eighteen**



International Economic Law and Development An Analysis of Instruments of Trade Policy and their Implications for Foreign Investment in Developing Economies

U.D. Ikoni, Ph.D*

Introduction

International trade stems from the fact that countries are endowed with different material and human resources. While one country may be richly endowed with a particular resource(s) it may be sorely lacking in another resource(s) needed for its development. As a result of this disparity, in order to achieve some sort of balance it becomes necessary for one country to export what it produces or has in excess and at the same time import from other countries what it lacks or requires for its development. Trade is therefore seen to be beneficial to both countries as they gain what they cannot produce or produce in sufficient quantity at the same time they are able to export what they produce in surplus in order

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to pay for their imports. Climatic and geological factors are also elements that come to play in international trade especially as it relates to exports of the poorer countries of the world. Trade is therefore encouraged between countries to balance these differences.

In addition to trade being encouraged among countries, free trade, that is trade without restraints or barriers is advocated as it is seen to promote a mutually profitable division of labour and also that it enhances the potential national product for all nations. Free trade is therefore advanced as the best form of trade between countries. Although the concept of free trade is advocated and encouraged in international trade, it is submitted that it operates more in theory than in reality as what is obtainable in practice is trade with Government's intervention in the form of various trade policies adopted by the government of the various countries that participate in international trade. Government's intervention in trade could be attributed to various reasons and such intervention has the effect of regulating and restricting trade between the countries of the world.

This chapter seeks to identify the various instruments adopted by government to regulate and restrict international trade, the rationale for such intervention and the implications for foreign investments in developing economies.

Conceptual Framework

International trade: is exchange of capital, goods and services across international borders or territories.¹ In most countries, it represents a significant share of gross domestic product

¹ See <http://dictionary.reference.com/browse/trade>.

(GDP). While international trade has been present throughout much of history, its economic, social, and political importance has been on the rise in recent years. Industrialisation, advanced transportation, globalisation, multinational corporations, and outsourcing are all having a major impact on the international trade system. Increasing international trade is crucial to the continuance of globalisation. Without international trade, nations would be limited to the goods and services produced within their own borders.

International trade is in principle not different from domestic trade as the motivation and the behaviour of parties involved in a trade do not change fundamentally regardless of whether trade is across a border or not. The main difference is that international trade is typically more costly than domestic trade. The reason is that a border typically imposes additional costs such as tariffs, time costs due to border delays and costs associated with country differences such as language, the legal system or culture.

Another difference between domestic and international trade is that factors of production such as capital and labour are typically more mobile within a country than across countries. Thus international trade is mostly restricted to trade in goods and services, and only to a lesser extent to trade in capital, labour or other factors of production. Then trade in goods and services can serve as a substitute for trade in factors of production.

Instead of importing a factor of production, a country can import goods that make intensive use of the factor of production and are thus embodying the respective factor. An example is the import of labour-intensive goods by the United States from China. Instead of importing Chinese labour, the United States

is importing goods from China that were produced with Chinese labour. International trade is also a branch of economics which, together with international finance, forms the larger branch of international economics and international economic law.

Another term worth's explaining is free trade policy. Free trade policy refers to a trade policy without tariffs, qualitative restriction and other clearance obstructing the movement of goods between countries.² Free trade has also been defined as absence of tariffs, quotas, exchange restrictions, taxes and subsidies on promotion, factor use and consumption.³ It is thus the unrestricted movement of goods and services across borders with little or no government involvement.

International economic law regulates the international economic order or economic relations among nations. However, the term 'international economic law' encompasses a large number of areas. It is often defined broadly to include a vast array of topics ranging from public international law of trade to private international law of trade to certain aspects of international commercial law and the law of international finance and investment.

The international economic law interests group of the American Society of International Law includes the following non-exhaustive list of topics within the term 'international economic law':

2 Derek, L. et al., *Success in Economics in West Africa* (London: John Murry Publishers, 1981) p.307.

3 Jhingan M. I. *International Economics* 5th edn (Delhi: Vrinda Publications Ltd, 2001) p.382.

1. International Trade Law, including both the international law of the World Trade Organisation and GATT and domestic trade laws;
2. International Economic Integration Law, including the law of the European Union, NAFTA and Mercosur;
3. Private International Law, including international choice of law, choice of forum, enforcement of judgments and the law of international commerce;
4. International Business Regulation, including antitrust or competition law, environmental regulation and product safety regulation;
5. International Financial Law, including private transaction law, regulatory law, the law of foreign direct investment and international monetary law, including the law of the International Monetary Fund and World Bank;
6. The role of law in development;
7. International tax law; and
8. International intellectual property law.

International economic law is based on the traditional principles of international law such as: *pacta sunt servanda*, freedom, sovereign equality, reciprocity, economic sovereignty. It is also based on modern and evolving principles such as: the duty to cooperate, permanent sovereignty over natural resources, preferential treatment for developing countries in general and the least-developed countries in particular.

When states began to function as politically independent and sovereign entities, they realised that one of the most important attributes of state sovereignty was economic sovereignty. Without this, political sovereignty was not complete. Asserting economic sovereignty meant having control over the economic activities of both juridical and natural persons conducting

business within the country, whether nationals of that country or foreigners.

Owing to a number of historical reasons, many states inherited on independence a situation in which foreign individuals or companies enjoyed certain concessions or privileges or control over the economic activities of the country concerned. In many states the natural resources and mining rights were controlled by foreign companies or individuals under a concession agreement entered into with the previous administration, whether colonial or otherwise.

When the country concerned wished to embark on a policy of economic development, one of the first initiatives it had to take is to consider harnessing its natural resources in accordance with its economic policies. It therefore became necessary for these states to assert sovereignty over the natural resources of the country and require that foreign individuals and companies comply with the new policy adopted by the state.

In many countries it was difficult to assert economic sovereignty without doing away with the rights, concessions and privileges enjoyed by foreign individuals and companies over the country's natural resources. However, developed countries whose nationals had gone overseas to invest and do business resisted attempts to impose national law on foreigners. They argued that existing concessions and contracts had to be honoured under international law. It was at this juncture that the concept of permanent sovereignty over natural resources was introduced in international law.

From the above definitions it can be inferred that free trade is a situation where two or more countries carry on trade without restrictions of any kind. It is a complete freedom of international

trade without restrictions on the movement of goods between countries. The only exception will be as regards import duties which may be levied by government for revenue generation and not for the protection of the company or industry.⁴

Evolution of Modern International Trade

Modern international trade is traced to about 1800, since that was the time foreign trade began to expand rapidly in volume and export of capital greatly increased.⁵ The development of industrialisation in response to the emergence of power technology may be the primary factor responsible for the phenomenon. Other factors that contributed to the increase of international trade include the American revolution, the wars of independence of Latin America which opened vast areas to trade with other nations, increase in population as a result of the industrial revolution and mass migration to the western hemisphere where the migrant retained their taste for European goods, etc.⁶ As a result of the above factors world trade shifted in emphasis from primary reliance on species and precious metals to raw materials, agricultural produce, machinery and other components of a modern trade pattern.⁷

During this era the Mercantilist doctrine of the seventeenth and eighteenth centuries whereby it was advocated that a country's export must be in excess of its income came under criticism as economist started advocating for trade liberalisation on the basis that trade could be advantageous to both parties. They stated that every transaction must not necessarily

4 Ibid, p.383.

5 Pekins, *International Relations* 3rd edn. (Delhi-India: ATTBS Publishers, 2004) P.133.

6 Ibid.

7 See <http://dictionary.reference.com/browse/trade>.

produce a gainer and a loser.⁸ The reasoning here was that if each state was free to produce the goods for which it was best suited, each would find its place and could prosper but this could only be beneficial if trade was without restraint. *Laissez faire* was therefore the gospel of free trade. Although, it cannot be said that the nineteenth century was an era when free trade was wholly exercised, it was an era where trade was carried on with very few restraints and at that time world commerce increased substantially.

However with the First World War in 1914 the world economy was greatly affected. The war disrupted the competitive economy that existed and the era witnessed lots of government intervention in trade in forms of various instruments adopted by the government of the countries of the world to regulate international trade. Although efforts were made by countries to return to the normal trade relations that existed before the war not successful.

An important epoch in the inter war years was the period of great depression. During this period productive capacity exceeded the purchasing power, so that some goods were sold at credit; the free price system could not bring prices to suit these countries that had suffered serious deflation. States therefore fell back on liquidation, wage reductions and credit restriction and trade was restricted as states tried to rehabilitate their national economies. They imposed restraint on trade. Thus, the increasing economic difficulties during the great depression led nations to impose restrictions on imports and exports with devices like quotas, incentives and higher tariffs. The increased trade restrictions led to decline in international trade. However with the intervention of the some countries

⁸ Ibid.

like the United States and western Europe, the trend of trade decline witnessed some sort of reversal.

With the coming of World War II, the grip of government on international trade was tightened by the military demand of the war and governments directly engaged in trade. With the close of the war, government still continued to engaged or intervene in trade. Though a return to a freer economy was urged but economic and political conditions prevented a significant response to the urge to return to a freer economy. The urge and struggle to return to a free economy led to the emergence of the GATT which was negotiated under the auspices of the United Nations and later, the emergence of the World Trade Organisation and other regional trading blocs like ECOWAS, Central American Common Market, European Union, etc. All these organisations sought to lower trade restraint and return to a freer economy where trade is regulated by the mechanism of demand and supply.

Free trade is reasoned from the theory of comparative advantage which states that a country specialises in the production of those commodities it posses greater comparative advantage or least comparative disadvantage. Under free trade therefore, a country specialises in the production of commodities which it is relatively best suited to produce and export them in exchange for those products which it can obtain more cheaply.⁹ The output of all participating countries is maximised as all gain from the trade. Free trade leads to international specialisation and division of labour. The existing resources in each trading country are therefore employed more productively and resource allocation becomes more efficient. This leads to optimum

9 Ibid.

utilisation of resources.¹⁰ Free trade secures the optimisation of consumption in the sense that it benefits the consumers when they are able to buy a variety of commodity from abroad at the minimum possible price it therefore has the effect of raising consumers' standard of living.

Under free trade countries specialise in the production of a few commodities, the firms and industries are of the optimum size therefore the cost of production of each commodity is at its minimum. Free trade ensures a lower price for exports as well as imports and the price mechanism under perfect competition prevents the formation of monopolies. This in turn leads to wider market for goods as the demand for goods is not confined to one country but to a number of countries. The entire world becomes the market for all types of goods. It therefore leads to the production of quality goods at low prices due to competition.¹¹

The above advantages are by no means exhaustive. However, in spite of these benefits, the practice of free trade can result in several problems. The existence of *lassiez-faire* and the working of price mechanism under perfect competition are conditions that become possible only in theory because in the real world, only imperfect markets like monopoly, cartels, imperfect labour market, etc., exist. Another factor which affected free trade was that under a free trade regime, some industries expand in which the country possesses comparative advantage but other industries are not developed. Thus, one sided development of the economy results under free trade policy.

As the movement of goods between countries is not restricted under a free trade policy, substandard and harmful commodities

¹⁰ Ibid.

¹¹ Jhingan, op cit P.383.

are likely to be produced and traded. This affects the social welfare of the people, hence the need to restrict importation of such commodities becomes necessary.¹²

Due to the diversity in natural and artificial endowment, countries with better factors endowment were able to produce certain commodities cheaper than others, thereby leading to stiff competition in the world market, which in turn resulted in the policy of dumping whereby huge quantities of product were sold at rock bottom prices in the foreign market to push out competitors.

The free trade policy was perceived as one of the factors that led to the exploitation and colonisation of countries during the 19th and early 20th centuries. It was therefore recognised that developing and underdeveloped countries could develop better under protection and not free trade.¹³

The factors identified above led to the abandonment of the free trade policy by governments, wherein they begin to impose control on the economic activities of their individual countries for the purpose of development. These controls were achieved through the adoption of various trade policies for the protection of the home industries from foreign competition and to promote the domestic welfare of their home countries.

The regulation of international trade is done through the World Trade Organisation at the global level, and through several other regional arrangements such as MERCOSUR in South America, the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, and the European Union between 27 independent states. The 2005

¹² Ibid, P.384.

¹³ Ibid.

Buenos Aires talks on the planned establishment of the Free Trade Area of the Americas (FTAA) failed largely because of opposition from the population of Latin American nations. Similar agreements such as the Multilateral Agreement on Investment (MAI) have also failed in recent years. These restrictions on goods and services are the subject of next section of this chapter.

Nature of Instruments of Trade Policies

A trade policy consists of a number of instruments related to goods and services employed by government to regulate trade.¹⁴ Trade instruments are basically used to control the volume of goods and services imported to a specific country. These instruments of trade policies include tariff barriers, subsidies, non-tariff barriers, etc.

Tariff Barriers: A tariff is a duty or tax imposed upon imported or exported goods. Tariffs are synonymous with custom duties. Note however that tax on export is uncommon and in some countries like the United State export tax is prohibited by the constitution.¹⁵ Although countries sometimes impose tariffs to generate revenue for the government the main purposes of tariffs is to reduce import in order to protect domestic procedures from foreign competition.¹⁶ It is note worthy that the same tariff can serve the purpose of both revenue and protection of the home industries. The most commonly used type of tariff is the *ad valorem* tariff which is levied as a percentage of the total value of the imported commodity. Other types of tariff are the specific, compound and sliding scale duties which may be imposed on specific basic tariff.¹⁷

14 Trade Policy Instruments www.sida.se/sida/jsp/sida.

15 Pekins op cit P.140

16 Handerson, J.V. et al., Principles of Economics (Massachusetts: DC Hearth and Company, 1991) P.111

17 Jhingan op cit P.395.

A tariff imposed on goods has the effect of increasing the price of these goods. This may lead to a reduction in the demand for these goods, therefore resulting in a decline in the purchase of such goods. As a result of price increase, imports of such commodities reduce but domestic production increases as it is stimulated by price increase. The domestic producers therefore gain as they sell at higher prices. This enables the home producers compete more effectively with the foreign producers of such commodity. Foreign producers suffer as they have to incur higher cost in the form of taxes they pay on the commodity to the government of the importing country. On the whole, consumers and foreign producers suffer as the consumer has to pay higher prices to purchase such commodity and the producer incurs more expenses in form of custom duties levied on the goods. High tariffs may result in retaliatory measures from the other countries that may also impose tariffs on their own commodities or other non tariff policies to mitigate their losses.

Non Tariff Barriers: These are obstacles to import other than tariffs. They are administrative measures imposed by a domestic government to discriminate against foreign goods in favour of home goods.¹⁸ They are basically classified under

- a. Quantitative trade restrictions; these include instruments like quotas and licenses, voluntary export restraint and other. Quantitative trade restriction seeks to control level of imports but do not influence the price.
- b. Fiscal measures; these relates to exports or production subsidies, export credits, subsidy or tax concessions on export, export tax, government procurement, anti dumping

¹⁸ Ibid, op cit P.250.

duties, countervailing duties among others.

- c. Administrative standards and regulation; these refer to health, sanitary safety regulations.

Quotas and Licenses: When a government wishes to impose a more direct control over imports it may use this system. A quota fixes the amount of a commodity in volume to be allowed into a country during a specified time. The quota may be fixed separately on each country or may be established globally. The purpose of quotas largely is to protect domestic producers or to make sure that the imports do not exceed exports. Therefore quotas are used to correct unfavourable balance of trade.

Note however, that import quotas are the most used as export quotas were rarely used. Sometimes, licenses are issued so that for each new import a license will have to be procured from government permitting such importation.¹⁹ Therefore the government can effectively control the volume of trade of a particular commodity within its country. However quotas and licenses are more likely to invite retaliation than tariffs as they exert an overt interference with the flow of trade.

Quotas, especially import quotas have the effect of increasing the price of the commodities on which the quota is imposed. Since the commodity is not as available as to meet the demand due to its restriction, the domestic producer is protected from foreign competition as the domestic production of the commodity increases due to prices increase incentive. Quotas have a negative effect on consumption as domestic consumption is reduced due to price increase. Quotas do not generate revenue for government except increase where government auctions

¹⁹ Pekins op cit 154.

import licenses benefits therefore goes to the exporters or domestic producers in form of higher price.²⁰

Import quotas or quotas generally are discriminating in restricting the supply of commodity from different countries, it therefore embitters international relation. The World Trade Organisation (WTO) in its policies prohibits the use of quotas as instruments of trade policies except in cases of agricultural goods or fishing.²¹

Voluntary Restraint Agreement (VRA): These are bilateral or multilateral agreements between an importing and exporting country where the exporting country or government agrees to limit its import to the other country.²² This policy is usually adopted by a country that its domestic industry suffers from large import. Example is the VRA entered by United States with Japan in 1981 over Japanese export of its automobiles into the United States, Japan agreed to limit its export of cars into United States of America. VRA are usually resorted to in situations where quotas are prohibited on the particular commodity. Therefore, in order not to violate international obligations, the parties negotiate and come to a decision where the exporter agrees to limit its export to the other country for a stated period.

Under a VRA, producers of the exporting country get the revenue from the trade restraint in form of increased prices of the products while consumers suffer loss as they purchase the commodities at higher prices.²³ The GATT/WTO rules have

20 Henderson, et al., op cit 1116.

21 Article XI (1) and XIII GATT Rules.

22 Henderson, et al., op cit 1117.

23 Ibid.

not made provisions regarding VRA, countries therefore resort to them without violating international trade agreements.

Subsidies: A subsidy can be defined as the transfer of wealth from the general treasury to a particular group of beneficiaries who it is believed cannot survive or at least maintain their standing on the basis of market forces alone.²⁴ Subsidies have the effect of distorting the flow of goods that would take place without government's intervention.

When government designs to assist firms selling goods in foreign market such subsidies are called export subsidies. Export subsidies are therefore grants given by government to an export firm to reduce the price per unit of goods exported abroad. Export subsidies may be direct or indirect. Subsidies provide an artificial competitive advantage because without such subsidies such a company could not have been able to sell its commodity at the low price. When an importing country observes that the exporting country is enjoying excessive advantage of selling at a lower price due to subsidy they may lobby their government to impose measures to check such unfair advantage and in such situations countervailing duties are imposed on such commodities.

The CATT/WTO rule discourages subsidies unless on primary products. Countries therefore resort to indirect export subsidies like subsidised credits, refund on tariffs on their imports, tax concession among others. Consumers benefit from subsidies as the subsidy has the effect of lowering the price of the commodity. Market supply is also increased and leads to a lower equilibrium price.²⁵ However government expenditure increases.

24 Lownfield, A.F International Economic Law 2nd Edn (Oxford: University Press, 2008) 216.

Exchange Controls: This is an alternative to various limitations on traded goods. Government may reduce the flow of these goods by restricting the amount of foreign exchange (currency) available for purchase. Government may also set a limit to the amount of money an individual can acquire to buy goods. This will lead to reduction in import.

A Common trend running through the instruments of trade policies enumerated above is the protectionist tendency. It can therefore be safely inferred that government most of the time employ these trade policies to protect the home industries at the expense of the foreign investor. The purpose of the General Agreement on Tariff and Trade GATT and the World Trade Organisation WTO basically is to address issues of protection and advocate issues of trade liberalisation and a shift away from trade restriction. It is therefore necessary to understand the reasons for trade policy instruments.

The Economic and Political argument for Government Intervention in Trade

Though the concept of free trade is promoted there are several reasons for which government intervenes in trade. These reasons are mostly economical but there are also some political reasons for such intervention in trade.

Tariffs and other controls imposed on import, it is argued, is to improve the rate at which the country's exports are exchanged for imports. Tariffs therefore are said to improve a country's terms of trade as the foreign exporter is forced to pay some part of the import duty. A country which imports in

25 Geoff, r. "Government Intervention in Market" (2006) Retrieved 15/10/2008, www.lutor2u.net.

large quantity benefits more and improves its terms of trade than a country which imports in small quantity.

However the adverse effect of trade restraint include reduction in volume of trade and increase in price of the commodity. Furthermore, there may be some retaliatory measures by the other countries through retaliatory tariffs or through use of non- tariff instruments which could occasion harm on both countries trade.²⁶

Tariffs are imposed to counteract the practice of dumping. Dumping is the case of monopolist discrimination where prices of commodities are raised in the protected home market and part of the proceeds of the higher price is used to subsidise exports so that they can undercut competitors in the world market. The importing country therefore imposes tariff on such products to off-set the advantage provided by the subsidy and therefore provide protection for its own producers.²⁷

Trade is restrained so as to diversify the domestic industry this is achieved when imports are reduced. The home producers are stimulated into increased production and all the sectors of the economy is achieved. It is argued that agriculture and the manufacturing sectors have to be protected from foreign competition in order to achieve a balanced economy. A balanced economy is hardly affected by disturbance in the international economy, diversification is therefore encouraged so that countries become as self sufficient as they can possibly be by protecting their home industries.

26 Jhingan op cit P.385.

27 Derek, et al., op cit P.309.

However, protection is not the only means by which a country can diversify its economy and it is also not possible for a country to be completely self reliant.

There is a classic argument for governments' intervention into trade that a new industry needs protection until it gets going and can stand on its own.²⁸ Developing countries often use this argument to protect their firms from established competitors in developed countries.

The basis for this reasoning is that firms need time to grow to an efficient size as small firms cannot achieve the economies of scale needed to compete successfully. The problem however is that when an industry is protected. There is a lot of difficulties when such protection is to be lifted when the firm has stabilised and can complete effectively. The protected industries often lobby and advance good reasons on why such protection should not be lifted. The result of this is that many full grown industries still enjoy infant industry tariff.²⁹ The disadvantage here is that such industries are not efficient as protection does not offer an incentive for development of efficiency as an industry can only be efficient if it competes favourably with other competitors.

This is done through export subsidies so that export producers are able to compete favourably in the international market. Government embarks on such policies to stimulate export in order to balance the terms of trade. The disadvantage here is that government expenditure increase and excessive subsidy may lead to dumping which is an unfair trade practice. The

28 Henderson , et al., op cit P.408.

29 Derek, et al., op cit. P.309.

essence of export promotion is to strengthen the economy of the country in question.³⁰

Tariff may be employed by government to reduce the level of unemployment. The imposition of a tariff reduces imports and encourages employment in other industries that are dependent on the import- competing industry and it may even spread to import substitution industries.³¹

However it has been argued that this does not diminish total unemployment. Some critics are of the view that tariffs do not reduce unemployment as a restriction on import leads to reduction of exports. Therefore, there will be unemployment in export industries, only very high tariffs can permanently reduce unemployment if it is due to very high wages, but the problem here is that high tariffs leads to retaliation.³² Tariffs only alleviates unemployment in the short-run.

The political arguments advanced are few. The significant one is that of national security. Countries adopt the policy of protecting their industries from the stand point of national defence. For if a country is dependent on other counties for its requirements of agricultural and industrial product, it will be harmful for its national interest in times of war. A country should be able to defend its freedom by being self sufficient as far as possible, even if it initiates an economic loss in the production of certain commodities which are needed for national defence.³³

30 Jones, Ronald W. 1961 *Comparative Advantage and the theory of Tariffs*; A Multi-Country, Multi-commodity Model, *Review of Economic Studies*, 28(3): 161-175.

31 Ibid.

32 Samuelson, P. 2001 *A Ricardo-Sraffa Paradigm Comparing Gains from Trade in Inputs and Finished Goods*. *Journal of Economic Literature*, 39(4): 1204-1214.

33 Jhingan, op cit P.372.

However complete self sufficiency is not possible even in terms of national defence as it will lead to inefficiency in domestic industries and loss of gains for international trade. Industries that are directly and indirectly needed for manufacturing of arms and ammunition and other war related materials should be developed under protection.

Instruments of Trade Policy and Foreign Investments

After the outbreak of World War II several attempts were made to reverse the trend towards protectionism and the GATT Agreement negotiated under the auspices of the United Nations in 1947 was one such attempt. The World Trade Organisation emerged also from the GATT in 1993 after the Uruguay Round and it had the duty of overseeing trade agreement and resolving international trade dispute. The WTO essentially embraced all the GATT rules and made several revisions of some provisions of those rules. The essential principles behind the GATT/WTO negotiations are that each nation is to reduce trade restrictions in return for reduction of restrictions by other countries.³⁴ These principles of GATT/WTO as they relate to trade policy could be summarised as follows:

- a. Trade should be conducted on the basis of non discrimination therefore similar duties and charges on the imports of goods should apply equally without regard as among contracting parties to the origin of the goods.
- b. That there should be no increase in trade barriers, therefore government restraint on movement of goods should

34 Henderson et al., *Op cit* P. 1132.

be kept at a minimum and if changed it should be towards reduction and not increase.³⁵

The only acceptable form of trade restriction as prescribed by GATT is the custom tariff as tariffs were seen as easy to understand and suitable for negotiation with other contracting parties. Conversely other forms of instruments of restrictions like quotas and licensing schemes are expressly prohibited though these prohibitions are subject to several exceptions like cases of primary produce like agriculture and other safe guards may be permitted in times of war.

The first six rounds of the GATT agreement deliberated on issues of tariffs and concession. The Tokyo round which was the 7th dealt with issues of Non Tariff Barriers (NTBs). It is noteworthy that GATT has been criticised for not addressing decisively on issues of NTBs. However GATT was able to legislate on issues of dumping and anti-dumping measures, subsidies and countervailing, government procurement, technical standards and import licensing. The Uruguay round of 1993 not only revised some of the trade guidelines, but also went further to legislate on issues of intellectual property aspect of trade and also aspect of services and transatlantic investment. Agreement on safe guards were reached by this round and trade in agriculture.³⁶

The WTO emerged at the Uruguay round and basically adopted all the rules of GATT. Though GATT/WTO has achieved some success in its objective in terms of substantial reduction in tariff duties and they have contributed greatly to freeing channels of world trade by uniting most of the important

³⁵ Lowenfield *op cit* p. 31.

³⁶ *Ibid*, p. 75.

trading countries of the world in bilateral and multilateral negotiations and agreement, the GATT/WTO has been weakened by many concessions and loopholes which the developed countries seems to benefit from. GATT/WTO is therefore seen to be biased to developed countries to the detriment of the developing countries. The result of this is manifested in the fact that developed nations have found strategies for mandating tariffs on their primary products that rely on such products.

Therefore, while developed countries enjoy benefits of trade liberalisation, the developing countries only see the negative effect of trade liberalisation. In opening up their borders to foreign trade, most developing nations experienced sharp increase in their import propensities which is not commensurate and this results in vicious cycle of trade and balance of payment deficit, financial instability, debt and recession.³⁷

These are some of the challenges that the WTO in its liberalisation campaign has to address on how all parties should be able to benefit from free trade and not the situation where some benefit and others suffer the negative effect on their economy.

Concluding Remarks

The general theme that runs through the reason why governments intervene in trade through the use of instruments of trade policy is basically to protect the home industry from foreign competition. However it has been identified that the losses from protectionism outweighs the gain in international trade and that protectionism in the long run affects the economy of the protecting country negatively as well as the other contracting parties with consumers of the commodities having to bear the

37 Khor, M. *Globalisation and the South some Critical Issues* (Ibadan: Spectrum Books Ltd., 2000) P.22.

brunt of price increase, reduction in volume in international trade among other effects. Hence the campaign for trade liberalisation with the WTO at the fore front since trade liberalisation is seen as the best form of trade where the countries benefit.

However, the GATT/WTO in striving to reduce trade barriers have to identify the peculiarities of developing countries and deal with them as such as the general rules governing liberalisation seem to have a negative impact on developing countries as this chapter has shown.

It is therefore submitted that developing nations be allowed to participate in the world economy on their own terms and not on terms dictated by global markets and multilateral institutions. This suggestion is anchored on the experience of countries like China who protected herself from foreign competition and opened up when it was ready to compete favourably. China can be counted as one of the super countries when it comes to cases of international trade.

If countries are forced to carry out liberalisation when they are not ready or able to cope, liberalisation in such cases may lead to a vicious cycle of trade and balance of payment deficit, financial instability, debt and recession.³⁸ Therefore multilateral institutions should stop pressuring developing countries to rapidly liberalise their trade as this will do more harm to them than good. It is therefore submitted that for liberalisation to be effective, developing countries must have the ability, freedom and flexibility to make strategic choices in finance trade and investment policies where they can decide on the rate and scope

38 Ibid, P.23.

of liberalisation and combine this appropriately with the protection of local firms and industries in their domain. To this end, developed countries should increase access to their markets for products from developing countries while developing countries should be allowed flexibility to choose their own rate of trade liberalisation.

Though cogent reasons have been advanced for the use of trade instrument to regulate trade, there is a need for a shift to a more liberal system of trade with few restraints and barriers as this is the only way that all parties to trade can benefit. For liberalisation to work therefore, it should be a gradual process especially as it affects developing countries. Trade protection should be gradually phased out and a more liberal system of trade adopted to further advance international trade for a positive impact on world economy. This conclusion is drawn from the UN General Assembly resolutions on the NIEO; the Charter of Economic Rights and Duties of States (CERDS) adopted in 1974 that "Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever."³⁹

39 See Article 1 of the Resolutions.

Chapter **Nineteen**



Appointment of Judicial Officers to the Superior Courts of Benue State

Tony A. Ijohor SAN*

Introduction

Different persons at different times and places have their own views about the governing issues and considerations to the appointments of judicial officers. To some lawyers who are in private practice and who belong to the ruling party, elevation to the higher bench in Benue State is a reward for their efforts. To some magistrates, armed with such a prefix as Magistrate or Chief Magistrate and being senior in rank should be a sure yardstick to be appointed a Judge. To some lawyers in government, especially those in the Ministry of Justice, elevation to the higher bench is a natural compensation for the years they have spent in the ministry. To the general public, many factors such as intrigues and manoeuvres, prejudice, ethnicity, luck and to a limited extent merit are the governing considerations. This therefore, calls for a sober

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reflection on the considerations governing the appointment of judicial officers in Benue State.

It must be borne in mind that it is not the aim of this chapter to hold that any judicial appointment in Benue State is not well deserved. The Benue bench at the higher level is second to none and this is attributable to the calibre of legal minds who have been appointed to man her superior courts.

This article therefore aims at ensuring that the culture of appointing the right minds on the bench is sustained so that the superior courts of Benue State would always remain what they have all along being known for.

A preliminary question to be answered is which courts are the superior courts in Benue State? The answer is simple. They are the Benue State High Court of Justice and the Benue State Customary Court of Appeal. Our discussion will therefore, be restricted to these two courts.

The Role of A Judge in the Administration of Justice

The sole duty of any judge in any country which upholds the rule of law as a way of life, is the attainment of justice in every given case. When it is realised that the basis of civic conflicts finds expression in man's refusal to give to man what is his due, the importance of dispensation of just order will be appreciated. On the shoulders of Judges would therefore seem to rest the initial burden of ensuring that no one unjustly suffers the deprivation of his liberty or freedom or is denied his rights without following the due process of law. It follows that the crucial service which a Judge renders to the society is the removal of sense of injustice. To ensure the proper performance of this important service, a Judge must possess a sense of impartiality. It has been said that the basis of a just

order on earth finds clear description in man giving to man what he is due. That, in essence, is what justice is all about.¹ But the job of Judges is by no means an easy one. They often do what the rest of the people seek to avoid; handing down judgments. They perform this function in the public. They (Judges) are mere mortals yet they are called upon to perform a function that is truly divine "Judge not that ye be not judged".² (See Matthew 7:1).

To the common man, a judicial officer is the representation or personification of God Almighty on earth. A judicial officer such as a High Court Judge who has the power to condemn a human being to death rightly or wrongly cannot justifiably shy away from such a description. People have come to identify law and the legal order strictly in the Judicial Officer.³

Before going on to examine the governing considerations for the appointment of judicial officers in Benue State, here are some real life jokes as captured by Giwa O. A. to show why certain persons are not suitable for the higher Bench. One is happy that all these real life jokes have not occurred in Benue State. Here are some of the true jokes:⁴

- a. A judge called a case and requested the clerk of court to ask all witnesses in the case to go out of court and out of hearing. This was done and they complied. Moments later, his lordship saw somebody standing and asked why he had not left the court and out of hearing. The astonished fellow told the judge that he was the plaintiff

1 Aderemi P. O. "The Role of a Judge in the Administration of Justice in Nigeria in Yakubu J. A. Administration of Justice in Nigeria (Essays in Honour of Hon. Justice Mohammed Lawal Uwais) (Malthouse Law Books 2000).

2 Ibid. p. 80.

3 Giwa A. O. "Appointment of Judicial Officer; an examination of the Governing Consideration" (2005) 3 No. 1 NBJ p.49.

4 Ibid. pp. 52-53.

in the case whereupon the judge shouted, "Are you not going to testify in this case? Come on go out of court and out of hearing." All entreaties from plaintiff's counsel for his lordship to see reason further incurred the wrath of the judge who insisted that his order must be obeyed.

- b. In another real joke, a judge upon the refusal to a motion *ex-parte* for interim injunction promptly dismissed the suit at that stage before pleadings were exchanged or evidence led.
- c. In yet another real but expensive joke, a judge made an award of millions of Naira in favour of a party for "his enjoyment and pleasure", a head of claim unknown to law.
- d. In another instance the bar was forced to remind a magistrate who was armed with a keg of palm wine from which he pulled occasionally whilst sitting that "wine was flowing for the first time outside the bar" to which the magistrate lamented in reply that it was a pity that there were no glasses to extend the flow to the bar.
- e. A lawyer was driving to attend court in another town, while on his way to the court, he saw somebody who looked like a lawyer apparently waiting for a taxi or a ride to go to court from a short distance to the court. He stopped and picked "the apparent" lawyer who nearly dozed off before they got to the court in less than 15 minutes. The lawyer had not been to that court before. Moments later, the High Court was announced and lo and behold, it was the ragged "lawyer" that he gave a

ride to that came out of the chambers to sit as a judge (presiding) without any jacket or coat on but with the rumpled gown held at the middle with an office pin.

- f. A judge who was on leave, suspended his leave to deliver a judgment and participated in the execution of same and purchased some of the items upon which he issued a writ of fieri facias.

It is therefore of great importance that due to the functions a Judge is required to perform great care must be taken in appointing the right persons to perform this great function.

Appointment of Judicial Officers in Benue State as provided under the 1999 Constitution

Section 270 of the 1999 Constitution has established a High Court for each State of the Federation. The High Court of a State shall consist of a Chief Judge and such number of Judges of the High Court as may be prescribed by a law of the House of Assembly of a State.

In line with Section 270 of the 1999 Constitution, the Benue State House of Assembly has passed into Law the High Court Law⁵ which provides in Section 4 (1) & (2) as follows:

- 4 1. *"In addition to the Chief Judge the Court shall consist of not less than two other judges, subject to the provision of part v"*
- 4 2. *"The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of the Chief Judge or of any Judge thereof".*

⁵ Cap 75 Laws of the Benue State of Nigeria, 2004.

It is submitted that the High Court Law does not prescribe the number of Judges of the High Court as mandatorily required by Section 270 (b) of the 1999 Constitution.

This section calls for amendments as it may be used in future to deny the state the opportunity to appoint more judges. The Constitutional provision is very clear. The Section States "Such number of Judges of the High Court as may be prescribed by a Law of the House of Assembly of the State".

Section 271 on the other hand provides for the appointment of a Chief Judge and Judges of the High Court of a State. The section provides:

1. The appointment of a person to the office of chief judge of a state shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State.
2. The appointment of a person to the office of a Judge of a High Court of a State shall be made by the Governor of the State acting on the recommendation of the National Judicial Council.
3. A person shall not be qualified to hold office of a Judge of a High Court of a State unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.
4. If the office of Chief Judge of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed those functions, the Governor of the State shall appoint

the most senior Judge of the High Court to perform those functions.

5. Except on the recommendation of the National Judicial Council an appointment pursuant to subsection (4) of this section shall cease to have effect after expiration of three months from the date of such appointment and the Governor shall not reappoint a person whose appointment has lapsed.

Section 280 of the 1999 Constitution provides for the establishment of a Customary Court of Appeal for any State that requires it. The Customary Court of Appeal is made up of a President and such number of Judges as may be prescribed by the House of Assembly of a State.

In line with Section 280 of the 1999 Constitution, the Benue State House of Assembly passed into Law the Customary Court of Appeal Law⁶ which in Section 6 prescribes the number of Judges of the said Court. In addition to the President, the Court shall consist of six other Judges. Section 6 provides:

6. In addition to the President, the Court shall consist of six other Judges to be appointed by the Appointing Authority acting on the recommendation of the Appointing Authority. The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of the President of the Court or of any Judge thereof.

- 5.1. Apart from such other additional qualifications as may be prescribed by a Law a person shall not be qualified to hold the office of a judge of the Customary Court of Appeal unless:

⁶ Laws of Benue State of Nigeria 2004.

- a. In the opinion of the Appointing Authority he has considerable knowledge of and experience in the practice of customary law, and
- b. He is qualified to practice as a legal practitioner in Nigeria and has been so qualified for not less than ten years.

Section 281 of the 1999 Constitution provides for the appointment of a President and Judges of the Customary Court of Appeal of a State. The section provides:

1. The appointment of a person to the office of President of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State.
2. The appointment of a person to the office of a Judge of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council.
3. Apart from such other qualification as may be prescribed by a law of the House of Assembly of the State, a person shall not be qualified to hold office of a President or of a Judge of a Customary Court of Appeal of a State unless-
 - a. He is a legal practitioner in Nigeria and he has been so qualified for a period of not less than ten years and in the opinion of the National Judicial Council he has considerable knowledge and experience in the practice of Customary Law; or

- b. In the opinion of the National Judicial Council he has considerable knowledge of and experience in the practice of Customary Law.
- 4. If the office of President of the Customary Court of Appeal of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed the functions of that, the Governor of the State shall appoint the most senior Judge of the Customary Court of Appeal of the State to perform those functions.
- 5. Except on the recommendation of the National Judicial Council, an appointment pursuant to subsection (4) of this section shall cease to have effect after the expiration of three months from the date of such appointment, and the Governor shall not reappoint a person whose appointment has lapsed.

Section 197 of the Constitution of the Federal Republic of Nigeria 1999 has established certain state executive bodies. One of such a body established for Benue State is the Benue State Judicial Service Commission. The composition and powers of the Judicial Service Commission is provided in items 5 and 6 of Part II of the third schedule to the Constitution. Items 5 and 6 provides as follows:

- 6. A State Judicial Service Commission shall comprise the following members:-
 - a. the Chief Judge of the State, who shall be the Chairman;
 - b. the Attorney General of the State;

- c. the Grand Kadi of the Sharia Court of Appeal of the State, if any;
 - d. the President of the Customary Court of Appeal of the State, if any;
 - e. two members, who are legal practitioners, and who have been qualified to practice as legal practitioners in Nigeria for not less than ten years; and
 - f. two other persons, not being legal practitioners, who in the opinion of the Governor are of unquestionable integrity.
- 7. The Commission shall have power to -
 - a. advise the National Judicial Council on suitable persons for nomination to the office of -
 - i. the Chief Judge of the State,
 - ii. the Grand Kadi of the Sharia Court of Appeal of the State, if any;
 - iii. the President of the Customary Court of Appeal of the State, if any,
 - iv. Judges of the High Court of the State,
 - v. Kadis of the Sharia Court of Appeal of the State, if any, and
 - vi. Judges of the Customary Court of Appeal of the State, if any;
 - b. subject to the provisions of this Constitution, to recommend to the National Judicial Council the removal from office of the Judicial Officers specified in sub-paragraph (a) of this paragraph; and
 - c. to appoint, dismiss and exercise disciplinary control over the Chief Registrar and Deputy Chief Registrar of the High Court, the Chief Registrars of the Sharia Court of

Appeal and Customary Court of Appeal, Magistrates, Judges and members of Area Courts and Customary Courts and all other members of the staff of the Judicial Service of the State not otherwise specified in this Constitution.

Some Comments on the Appointment of Chief Judge and President Customary Court of Appeal

By virtue of Section 271 (1) of the 1999 Constitution, the appointment of a person to the office of Chief Judge shall be made on the recommendation of the NJC subject to confirmation of the appointment by the House of Assembly of the State.

The 1999 Constitution is silent as to whether a person to be appointed as the Chief Judge of a State must be a serving Judge. It means therefore that any person who is qualified to hold the office of a Judge of a High Court of a State can be made a Chief Judge. Thus a person who is not a serving Judge at all can be made a Chief Judge. It is submitted that this section of the Constitution should be amended so that no one is in doubt that when where the office of the Chief Judge becomes vacant, only serving Judges would be appointed to fill such vacancy.

Furthermore, since it has become shown by experience in other States of the Federation, it is suggested that the person to fill the vacancy should be chosen amongst the first three most senior Judges. If the most Senior Judge is for one reason or the other not recommended, then the next in line should be and where he is also not recommended then the third in line should be recommended. A situation where the most junior Judge is made a Chief Judge over and above all his seniors must be condemned.

As regards the appointment of a person to the office of President of the Customary Court of Appeal, S.281 (1) has provided that such appointment shall be made by the Governor on the recommendation of the NJC subject to confirmation of such appointment by the House of Assembly. Like S. 271(1), it is also not provided that the person must be a serving Judge of the Customary Court of Appeal. It is hereby suggested that the person to be appointed should be a serving Judge and such appointment should also be restricted to the three most senior Judges of the Customary Court of Appeal.

As regards the qualification for appointment of a President of the Customary Court of Appeal, it is provided in S.281 (3) that the person shall be either a Legal Practitioner in Nigeria and has been so qualified for a period of not less than 10 years and in the opinion of the NJC he has considerable knowledge and experience in the practice of Customary Law or if in the opinions of the NJC, he has considerable knowledge and experience in the practice of Customary Law. Thus, a person can be made President of the Customary Court of Appeal even when he is not a lawyer but the NJC is of the opinion that he has considerable knowledge of, and experience in the practice of Customary Law. Or if in the opinion of the NJC, he has considerable knowledge and experience in the practice of customary law. Thus, a person can be made President of the Customary Court of Appeal even when he is not a lawyer but, the NJC is of the opinion that he has considerable knowledge of and experience in the practice of customary law.

It is suggested that this constitutional provision should be amended so that only lawyers who have been so qualified for a period of not less than 10 years and who in the opinion of the NJC have considerable knowledge of, and experience in

the practice of Customary Law are made President of the Customary Court of Appeal. I, for one, will not be amused where my colleagues who have put in ten years at the Bar are made to be Judges of the Customary Court of Appeal to serve under a President who is a non-lawyer.

It is important to note that the Benue State House of Assembly in its wisdom has taken care of this problem as far as Benue State is concerned. Under section 6 of the Customary Court of Appeal Law, a person can only be made a Judge of the Customary Court of Appeal if he is amongst other things a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.

Procedure for Appointment of Judicial Officers in Benue State.

The procedure for appointing Judicial Officers in Benue State is contained in the National Judicial Council Guidelines and Procedural Rules 2003, which came into force on 1st day of January, 2004.

The National Judicial Council (NJC) approved the Rules as its Guidelines and Procedural Rules which shall be followed by the Federal Judicial Service Commission, (FJSC) State Judicial Service Commission, (SJSC) and the Federal Capital Territory Judicial Service Committee (FCTJSC) in their advice, nominations or recommendation of candidates for appointment as Judicial officers for the High Courts, Sharia Court of Appeal and Customary Court of Appeal under the Constitution.⁷ These rules are expected to be strictly complied with.⁸

Whenever the Chairman of a State Judicial Service Commission (SJSC) proposes to embark on an exercise to appoint Ju-

7 Rule 1 (1) of the NJC Guidelines and Procedural Rules 2003.

8 Rule 1 (3) Ibid.

9 Rule 2 (1) Ibid.

dicial officers, he shall give notice to the Governor of the intention to appoint a specific number of judicial officers and ask for the Governor's consent to proceed with the exercise. On no condition is the name of any candidate be submitted to or accepted from the Governor.⁹

A copy of the said Notice to the Governor is forwarded to the Secretary of NJC at the same time clearance is being sought from the Governor. A copy of the Governor's response shall equally be forwarded to the Secretary of the NJC immediately it is received by the Commission.¹⁰

Upon receipt of the Governor's clearance, the Head of court concerned shall call for nomination of suitable candidates from every Judicial officer of superior Courts in the State.¹¹

He shall further write to every Head of Superior Courts in Nigeria asking for nomination of suitable candidates, if any, provided that Senior Advocates of Nigeria (SAN) or other Senior Private Legal Practitioners who are still under 50 years of age or thereabout may be nominated by Chief Judges of their States or origin and offered the opportunity to be considered for appointment as Judges of the High Court or recommended to FJSC through the President of the Court of Appeal for appointment into the Court of Appeal.¹²

The Judicial officers recommending suitable candidates must show in their recommendation that the candidate has appeared before them as Counsel or that they had sat on Appeals over Judgment delivered by such candidate as the

10 Rule 2 (2) Ibid.

11 Rule 3 (1) (i) Ibid.

12 Rule 3 (1) (ii) (a) Ibid.

13 Rule 3 (1) (ii) (b) Ibid.

case may be. They must vouch from their personal knowledge of the candidate's good character and reputation, maturity, honesty, integrity, sound knowledge of law and or successful practice at the Bar/satisfactory presentation of cases in Court as a legal practitioner amongst other things.¹³

After the closing date, the Head of Court concerned is required to short list not less than double the number of Judicial officers intended to be appointed.¹⁴ He shall further circulate the list of short-listed candidates to all serving Judicial officers in the State and all the Branches of Nigerian Bar Association in the State asking their comment on the suitability or otherwise of any of the short-listed candidates.¹⁵

In carrying out the short-listing exercise, the Head of Court shall take into consideration as much as possible professional expertise, seniority at the Bar or the Bench, Federal Character or geographical spread where necessary and possible, without compromising the cherished independence of the Judiciary or allowing politics to permeate or influence the appointment and avoid recommending any person whose reputation in the locality had been tarnished.¹⁶

The Chairman of the JSC shall then forward to every short-listed candidate NJC's form "A" which shall be completed and returned to the Chairman by the short-listed candidate together with any attachment.¹⁷

The chairman of the JSC shall then table before the JSC for its consideration, the short-listed candidates together with:

14 Rule 3 (2) Ibid.

15 Rule 3 (3) Ibid.

16 Rule 3 (4) Ibid.

17 Rule 4(1) Ibid.

- a. The completed NJC form "A" and the attachment thereto in respect of each candidate.
- b. the comments of the persons specified under Rule 3 (30.
- c. any petition or protest against a short-listed candidate.
- d. detailed medical certificate of fitness issued by a Government hospital or institution.
- e. report by Department of State Security Services stating clearly whether the Department kept a file on the candidate and if so, what the report contained. Where no file is kept on the candidate, full facts found upon investigation should be stated.¹⁸

In considering the short-listed candidates, Judicial Service Commissions shall take into account the fact that Judicial officers hold high office of State and an office carrying enormous powers and authority. Accordingly, the JSC shall-

- i. regard the following qualities as essential requirements for the selection of suitable candidates to the high office of a Judge of the High Court, Sharia Court of Appeal and the Customary Court of Appeal -
 - a. good character and reputation, maturity, honesty, integrity, sound knowledge of law and ability;
 - b. successful practice at the Bar/satisfactory presentation of cases in court as a legal practitioner both in private practice and as legal officers in the Ministry of Justice or Corporate establishments.¹⁹
- ii. The JSC shall also consider that candidates for the high office of Judicial officers of superior Courts shall be

¹⁸ Rule 4 (2) Ibid.

¹⁹ Rule 4 (3) (i) (b) Ibid.

disqualified and shall not be recommended for appointment if found to have been involved in;

- a. canvassing or lobbying for the appointment directly or indirectly.
- b. bad behaviour, whether in or out of Court.
- c. known impecuniosity.
- d. none or very limited exposure to practice at the Bar and conduct of cases in the High Courts.²⁰

The decision of the JSC in respect of nomination and recommendation in respect of appointment of Judicial officers shall be authenticated by adopted minutes of a JSC meeting signed by the Chairman and Secretary.²¹

The Chairman of the JSC shall then submit the request for NJC recommendation by a memorandum concluding with a clear statement that the NJC Rules have been compiled with fully.²² The memorandum to the National Judicial Council shall be addressed to the Chairman or Secretary of the Council.²³ The memorandum which shall contain justification for the number of Judicial officers sought to be appointed, shall be accompanied by;

- i. minutes of meeting of the Judicial Service Commission or Committee where the nomination of candidates for appointment to judicial office was considered and a decision taken,
- ii. all the materials and documents placed before the JSC as required by Rule 4 (2) in respect of nominated candi-

²⁰ Rule 4 (3) (ii) *Ibid.*

²¹ Rule 4 (4) *Ibid.*

²² Rule 5 (1) *Ibid.*

²³ Rule 5 (2) *Ibid.*

²⁴ Rule 5 (3) *Ibid.*

- dates,
- iii. proof of the prescribed establishment by legislation for the particular court,
 - iv. proof of adequate Capital Vote provision in the current approved Budget for the Superior Court, and
 - v. practical proof of availability of accommodation Court Hall, Residence, Car and Library among others.²⁴

Essential Requirements for the Selection of Suitable Candidates to the Office of a Judge

The essential requirements for the selection of suitable candidates to the office of a Judge here under consideration are based on the qualities that the judicial Service Commission (JSC) is required to take into account as essential requirements for the selection of suitable candidates to the high office of a Judge. As contained in Rule 3 (i) of the NJC Guidelines and Procedural Rules 2004, the essential qualities are: good character and reputation, maturity, honesty, integrity and sound knowledge of the Law. For members of the Bar, there must be in addition successful practice at the Bar/satisfactory presentation of cases in Court as a legal practitioner both in private practice and as legal officers in the Ministry of Justice or Corporate establishments.

As a magistrate, the short listed candidate is required to give particulars of his selected judgments delivered by him in the past two years as Chief Magistrate or in any given past two years before the candidate's present appointment/position. The candidate is required to annex copies of his judgments that he considers his best.

The Judicial Service Commission (JSC) has also been given the power under Rule 3 (ii) to disqualify and not to

recommend for appointment if it finds that the candidate is involved in:

- a. canvassing and lobbying for the appointment directly or indirectly.
- b. bad behaviour, whether in or out of court.
- c. known impecuniosity (having very little money especially over a long period).
- d. none or very limited exposure to practice at the Bar and conduct of cases in the High Courts.

Concluding Remarks

Although the Constitution and the NJC Guidelines make clear provisions to the appointment of Judicial officers, the application of the provisions at times bring some problems. Certain appointments cannot be explained. One may look at the case of *Ayileye v. Fakayode*²⁵ where the relevant facts are as follows:

The appellant was the Director of Public Prosecutions of Oyo State when an accused person Nosiru Bello, whose appeal against a death sentence was pending was executed on the advice of the State Ministry of Justice. The advice which emanated from one Mr. Adeniji reads thus:

In my view this is not a suitable case in which the Governor should exercise his power in favour of the convict as there is nothing in the record to entitle the convict to any form of clemency. I therefore recommend that the conviction and sentence pronounced on the convict be upheld and confirmed.

25 (1998) 4 NWLR (pt. 505) 184.

The appellant had in a minute to the Attorney General said that he agreed with this opinion of Mr. Adeniji.

Subsequently, the name of the appellant was submitted along with others to the Judicial Advisory Commission to be considered for appointment as a Judge of the Oyo State High Court. This generated considerable controversy. The 1st respondent who was the chairman of the Judicial Advisory Commission, being the Chief Judge of the State at the time and one Chief Esan did not support the appointment of the appellant when the matter first came up although two other members did. However, at the second meeting of the commission, the appellant's name was listed among those eligible for appointment. He was thereafter appointed as a Judge of the Oyo State High Court by the Governor of Oyo State.

On the 10th of February, 1987, the 2nd Respondent published the following words of and concerning the appellant on page 16 of the New Nigerian Newspaper:

The former Chief Judge said that he first heard of the case in 1982 at a time he was about to determine the appointment of some new Judges and discovered one of those to be considered was involved and as such he raised objection.

There Mr. Justice Fakayode further told the New Nigeria that he discovered in the file that the D.P.P Chief Ajileye whose name was among those to be screened for the appointments was the very officer who signed the papers of advice to the Governor in the case. He added that Ajileye admitted that as D.P.P he did not know if an appellant has such right.

He explained that as a result he did not approve the

appointment of Chief Ajileye as a Judge but Chief Bola Ige as the then Governor of Oyo State however overruled him and appointed Chief Ajileye as a Judge."

Aggrieved by the publication, the appellant instituted an action at the High Court against the respondents claiming N2, 000,000.00 against the respondents jointly and severally being damages for libel contained in the publication.

What concerns us here is that a person who claimed that he did not know that a person who has appealed against a death sentence passed on him was not to be executed was rewarded with a judicial appointment to the higher bench.

The other big problem has to do with the candidates themselves. The position is fairly ugly these days. Some candidates go about campaigning for appointment as Judges and they do so shamelessly. There are cases where candidates send applications to the Chief Judge. Others simply send to the Chief Judge their Curriculum Vitae. Worse still, some candidates cause a delegation of Elders to visit the Chief Judge soliciting that their son be appointed to the higher bench. Members of the Judicial Service Commission are sometimes harassed by politicians soliciting for some candidates.

It is our view that in Judicial appointments, candidates especially those from the Bar should be wooed. They should not beg for the job. Similar sentiments have been expressed by Niki Tobi JSC in his Book "The Nigerian Judge"²⁶ where

26 (A and T Professional Publishers 1992) p. 21.

27 Oputa C. A. *The Law and the Twin Pillars of Justice*. (Government Printers, Owerri (1981) P. 54.

28 *Ibid* at P. 21.

he stated:

The job of a Judge is a very Honourable one, there is no application or better still there should be no application. A learned writer defined a Judge as a barrister who is invited to sit on the Bench when he has had a lot of standing at the Bar.²⁷ In other words, no application is written or should be written.²⁸

One should not be mistaken to be saying that one should not be ambitious. The situation is that, it is now much more difficult to become a judge of the superior courts in Benue State especially for those on the bench. The vacancies are few and there are so many qualified persons hence the desperation. Another factor is the disparity in the pay package of a Chief Magistrate and a High Court Judge. A way out of this is to give the Magistrates higher pay and make them more comfortable. How would you feel if you are on the same position with a colleague of yours as a Chief Magistrate and who by the Special grace of God is elevated to the Higher bench and is receiving more than ten times what you earn in a month? The answer to this is to increase the salaries of Magistrates so that a person who retires as a Magistrate would feel proud and fulfilled.

Valley of Decisions is put together to honour the Chief Judge of Benue State, His lordship Hon. Justice Iorhemen Hwande, a man who 'had to crack his nuts' like every mere mortal. One only has to peruse his decision in *Kaya Zungwe v. Hyacinth Zashava & Another*, to have an idea of the astuteness of mind of His lordship Hon. Justice Iorhemen Hwande.

Chapters 16 to 19 of this book are about the various aspects of the Nigerian Law and how it could be improved upon as the case may be. Chapter 6 in particular talks about the incorporation in Nigeria and how the people could make better use of the law by understanding the contents therein. This sets the tone for most of the chapters contributed by other legal luminaries.

Valley of Decisions is an honour well deserved by His lordship Hon. Justice Iorhemen Hwande for his service to Benue State and Nigeria. It is a must read for anyone seeking more light as regards various aspects of Nigerian Law.



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